



# GOING OFF THE RAILS:

*The Slide Towards* **the Lawless South African State**

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# GOING OFF THE RAILS: THE SLIDE TOWARDS THE LAWLESS SOUTH AFRICAN STATE

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## SETTING THE SCENE

South Africa is widely recognised as a lawless country. It is also a country run by a government which has itself become increasingly lawless. This is so despite all the commitments to legality set out in the Constitution. Not only is the post-apartheid South Africa founded upon the principle of legality, but courts whose independence is guaranteed are vested with the power to ensure that these principles are upheld. Prosecuting authorities are enjoined to exercise their functions “without fear, favour, or prejudice”. The same duty is laid upon other institutions established by the Constitution, among them the public protector and the auditor general. Everyone is endowed with the right to “equal protection and benefit of the law”. We are all also entitled to “administrative action that is lawful, reasonable, and procedurally fair”. Unlike the old South Africa – no doubt because of it – the new *Rechtsstaat* was one where the rule of law would be supreme, power would be limited, and the courts would have the final say.

This edifice, and these ideals, are under threat. Lawlessness on the part of the state and those who run it is on the increase. The culprits run from the president down to clerks of the court, from directors general to immigration officials, from municipal managers to prison warders, from police generals to police constables, from cabinet ministers to petty bureaucrats. Lawlessness ranges from protecting the criminal, to hounding the innocent, to crushing the poor. It runs from the unconstitutional to the outright criminal, from the brazen and defiant to the negligent or ignorant. It embraces slamming down the telephone on judges as well as victimising traffic policemen who flag down celebrities. It ranges from violations of parliamentary procedure, to breaches of the Public Finance Management Act, to outright skulduggery and corruption. Its victims include taxpayers who get fleeced, mining companies whose licence applications are unlawfully denied, suppliers who do not get paid for their services, and motorists who are forced off the road by reckless government drivers. The victims also include prisoners denied medical treatment, refugees forced to pay bribes, hawkers whose goods are unlawfully confiscated, and poor people unlawfully evicted from shacks which are then unlawfully demolished.

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Some people are unlawfully appointed, some unlawfully dismissed, some both. Others are unlawfully denied appointment or promotion. A criminal record is no bar to appointment or promotion, even in agencies designed to combat crime. Physical torture seems to be pervasive. Perpetrators of crime often get away with it. Some victims are able to seek redress in the courts, others suffer in silence. Many cases of lawlessness are reported in the newspapers, but they are probably the tip of quite a large iceberg.

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The courts are the ultimate guarantors of our rights and of legality but they are insulted, their orders are sometimes ignored, and their decisions are frequently taken on endless appeals. Sometimes instead of bowing to the courts and the law, the government seeks – unlawfully – to change the law. Statutory organisations designed to apply the law are deliberately undermined, while watchdogs and whistleblowers seeking to uphold the law are subjected to intimidation. Lawlessness predates President Jacob Zuma’s assumption of power in 2009, but it has intensified during his rule as more and more people and institutions follow his example and the examples of those who condone his behaviour.

## SOURCES AND CAVEATS

Newspapers and websites are the major sources of the information in this report, supplemented sometimes by reports from various organisations. To probe any further would have been impossibly time-consuming. Where allegations are made, these are included in good faith. The same applies to comments by various specialist organisations or informed individuals. Although the previous government frequently dismissed allegations about what happened in police cells, these were often later found to be true. We suspect that similar allegations made today, although also difficult to prove, are also true.

There is plenty of overlap between the various categories into which the entries below have been subdivided. Items under a particular heading could easily fit somewhere else instead or in addition. Repetition is sometimes unavoidable to ensure clarity, but it has been kept to a minimum. Some cases are borderline: it is often not clear how far action described as “irrational” or expenditure described as “irregular” is a technical breach or seriously unlawful.

*Lawlessness predates President Jacob Zuma’s assumption of power in 2009, but it has intensified during his rule as more and more people and institutions follow his example and the examples of those who condone his behaviour.*

The state is broadly defined to include government at all levels, along with statutory institutions, and state-owned enterprises. It is not always possible to determine whether actions or statements reported are undertaken by the people cited in their official capacities on behalf of the state or under their own steam. Officials taking bribes are presumably not acting under departmental instructions, but when prosecutors act or fail to act in particular cases they may be operating under the instructions of superiors, or at any rate giving effect to what they think their superiors desire. Government drivers in “blue-light” motorcades feel entitled to endanger the lives of others because the ministers sitting in the back seat think themselves above the law.

This paper has less information on the failure of the state to implement “socio-economic” rights than it has on other forms of lawlessness. Although the Constitution guarantees a whole range of such rights, their implementation is subject to what the state can afford. For the courts to issue orders to provide “adequate housing”, for example, is far more complicated than ordering a halt to illegal evictions. One judge went as far as saying in an interview with the Judicial Service Commission that some of the orders issued by the courts on socio-economic matters were not “practically implementable”.

The items listed under each sub-section below generally appear in reverse chronological order, with the most recent on top of each list. However, this general rule is sometimes broken in order to keep entries on the same topic together. The relative paucity of entries from earlier years may be because there was less lawlessness then. But it also reflects the need to avoid making the paper too long. The fact that there are more entries about the Johannesburg city council than about councils in other parts of the country arises from the fact that the paper relies mainly on newspapers published in Johannesburg. It is not designed to suggest that the Johannesburg council is more prone to disobey court orders than some of those elsewhere. Some of the decisions referred to in the paper may have been reversed or upheld on appeal. If this is not recorded, the reason may be that the appeal was not as widely reported as the original decision.



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## SUMMARY

*The single-line entries below summarise the more detailed “blow-by-blow” accounts given in the next section of this report. They also follow the same order.*

### **Unconstitutional action**

Constitutional Court finds president violated Constitution in undermining public protector  
Constitutional Court says Parliament also violated the Constitution over the public protector  
President fails to sign legislation to combat financial crime despite constitutional obligation  
Supreme Court of Appeal rules Parliament’s bans on broadcasts unconstitutional  
High Court says Judicial Service Commission acted unconstitutionally in leaving vacancies  
Unconstitutional attempt to extend term of chief justice avoided by that judge’s withdrawal

*Constitutional Court finds president violated Constitution in undermining public protector*

*Constitutional Court says Parliament also violated the Constitution over the public protector*

Constitutional Court invalidates legislation establishing Hawks  
Parliament fails twice to remedy defects in Hawks legislation despite court instructions  
Ministry of Defence accused of unconstitutional deployment of the defence force

### **Unconstitutional laws**

Parliament ignores president’s objection that minerals bill is unconstitutional  
Constitutional Court strikes down aspects of IPID legislation  
Citizenship Act of 1995 said to be unconstitutional by providing for citizenship deprivation  
High Court invalidates legislation establishing medical care price list  
Speaker of National Assembly expresses concern over volume of unconstitutional legislation

### **Unconstitutional policies**

Various organisations say revolutionary ideology is incompatible with the Constitution  
Cadre deployment policy said to be out of keeping with the Constitution  
Enforcement of racial quotas said to be out of keeping with the Constitution

### **Unlawful orders**

Public protector says transport minister’s directive to halt rail investigation is unlawful  
President Jacob Zuma unlawfully decrees there will be no fee increases at universities

### **Lawmaking procedures not followed**

Constitutional Court strikes down land act as unconstitutional for lack of public participation  
Parliament fails to allow adequate public participation in the processing of three other bills

### **Parliamentary rules violated/institutions undermined**

Energy minister refuses to hand over nuclear documents required by Parliament  
Energy minister fails to hand over Petro SA documents required by Parliament  
Defence minister refuses to cooperate with standing committee on public accounts (Scopa)  
ANC uses parliamentary majority to thwart Scopa probe into R47 billion arms deal

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## Court orders ignored/flouted/contradicted/defied/appealed

SCA confirms government acted illegally in not arresting Omar al-Bashir

High Court warns that disobedience to court orders threatens democracy

Government announces withdrawal from International Criminal Court (ICC)

ICC withdrawal announcement challenged as unlawful by official opposition

Communications minister says SCA encryption ruling will not stop her

SCA gives suspended sentence to former compensation commissioner for contempt

SCA upholds ruling that Department of Home Affairs ignored court orders on refugees

Parliamentary committee accused of keeping quiet about frequent flouting of laws

Constitutional Court says Johannesburg city council acted unlawfully in business transfer

SCA dismisses education minister's appeal against order to deliver books to Limpopo schools

High Court orders education department to hire administrator to ensure payments to schools

High Court orders police to pay compensation for failure to enforce interdict against strikers

Fisheries minister issues abalone permits only after contempt-of-court application against her

*SCA confirms government acted illegally in not arresting Omar al-Bashir*  
*High Court warns that disobedience to court orders threatens democracy*

Deputy director general of home affairs found guilty of contempt of court over detention

Gauteng premier delays complying with order to pay damages to brain-damaged child

Former deputy chief justice criticises government "tardiness" in complying with court orders

Allegations made of "numerous" cases of ministers ignoring court orders

Johannesburg city council accused of ignoring court order on security structures

Johannesburg city council accused of ignoring court orders to provide emergency shelter

Johannesburg council and security company found guilty of contempt for illegal evictions

Johannesburg council ordered to rebuild homes unlawfully destroyed during illegal eviction

High Court gives minister suspended prison sentence for failing to comply with court order

Master of the Western Cape High Court found to have acted unlawfully over payment order

NPA fails to implement order of South Gauteng High Court to return seized assets

High Court finds two ministers guilty of contempt over ARVs for prisoners

*Deputy director general of home affairs found guilty of contempt of court over detention*  
*Gauteng premier delays complying with order to pay damages to brain-damaged child*

## Attacks on the courts

President Jacob Zuma says Constitutional Court wrong to think it is "close to God"

Mr Zuma criticises "low-intensity law-fare" against "democratic outcomes"

ANC secretary general attacks courts for arresting function of government and creating chaos

South African Communist Party (SACP) accuses judges of "blackmail" and "overreach"

ANC, SACP, and Cosatu attack "certain judges" as "consistently against the state".

Former national director of public prosecutions says politicians loath to obey the law

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## Warnings by judges

Chief justice and 26 other senior judges deplore “repeated and unfounded criticism”

## Statutory institutions undermined/attacked

Public protector says government is stonewalling 1 700 queries and directives

Public protector raided in 2011 after finding against police commissioner on leases

Public protector reported in 2011 to be facing arrest for corruption but not arrested

Public protector says organs of state encourage impunity by ignoring her findings

Public protector complains of unprecedented “vitriolic attacks” over her Nkandla findings

Public protector says in 2016 that people light fires under her to thwart investigations

Top prosecutor suspended for refusing to drop criminal charges against top policeman

National director of public prosecutions paid R17.3 million to quit in odd circumstances

Court orders reinstatement of police auditor removed for probing corruption

## Attacks on private whistleblowers

Private investigator of police corruption arrested by 15 policeman for minor offence

Private investigator alleges corrupt police officials tried to kill him

Helen Suzman Foundation robbed after challenging Hawks chief

Police raid home of Hugh Glenister after he challenges Scorpions dissolution

*Public protector says organs of state encourage impunity by ignoring her findings*

*Public protector complains of unprecedented “vitriolic attacks” over her Nkandla findings*

*Public protector says in 2016 that people light fires under her to thwart investigations*

## Unlawful harassment/prosecution

Former constitutional court judge says Hawks are unlawfully persecuting finance minister

Second former constitutional court judge blames President Zuma for pursuing the minister

Hawks hand docket against finance minister Pravin Gordhan to NPA

Finance minister says he will not back down in efforts to save the country from “thieves”

Fraud and theft charges against finance minister widely dismissed as baseless

Former constitutional court judge says investigative edge at SARS has been sabotaged

National Treasury voices suspicions over complaints against its chief procurement officer

High Court sets aside unlawful decision to prosecute Major-General Johann Booysen

National director of public prosecutions fired for prosecuting Jackie Selebi

Freedom Front Plus lays charges against Gauteng education MEC under Children’s Act

Case withdrawn against police who stopped Mrs Madikizela’s–Mandela’s speeding car

Law Society criticises correctional services minister for unlawful parading of prisoners

## Institutions/officials behave unlawfully/arrogantly/above the law

High Court rules 9.4% electricity tariff increase irrational, unfair, and unlawful

Labour Court orders reinstatement of SABC journalists unlawfully dismissed

Constitutional Court says Independent Electoral Commission acted unlawfully over addresses

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High Court orders Department of Labour to hand over fire report unlawfully kept secret  
Corruption Watch says that immigrants are subjected to repeated demands for bribes  
Lawyers for Human Rights says a third of refugees are asked for bribes  
Deputy minister says municipal managers refuse to act on instructions  
Municipal administrator says he is shocked at lawlessness and corruption

*Deputy minister says municipal managers refuse to act on instructions  
Only 7% of local authorities comply with statutory reporting requirements  
Only 44% of national departments comply with such requirements*

Only 7% of local authorities comply with statutory reporting requirements  
Only 44% of national departments comply with such requirements  
Auditor general says at least 58 arms transactions actions were unlawfully entered into  
High court judge criticises prison officials for “complete and utter disregard” of the law  
Tshwane metropolitan police unlawfully tell motorist he cannot renew his licence  
Accusations made that ignoring rules of the road has become a “perk” of office  
Accusations made that official drivers “get away with murder”  
Government says ministers’ drivers are permitted to ignore speed limits  
SABC journalist killed in collision with Zulu monarch’s motorcade  
Johannesburg and Cape Town police accused of unlawfully arresting motorists  
International relations minister refuses to allow her handbag to be x-rayed at Oslo airport  
President Zuma fails to comply timeously with reporting requirements on his assets

### **Power/licensing/regulator abuses/over-reach**

Economic development minister accused of usurping power of competition regulators  
Competition Tribunal accused of violating due process over imposition of fines  
National Consumer Tribunal criticises Consumer Commission for issuing illegal notices  
Icasa accused of “making rules on the run” on spectrum licensing  
Department of Mineral Resources (DMR) accused of making unwarranted demands  
DMR accused of victimising mining companies by ordering shutdowns  
High Court criticises officials for gross abuse of powers in closing down of brickworks  
Kumba Iron Ore finally wins eight-year battle for mining licence unlawfully withheld  
Fraser Institute says granting of mineral exploration rights is corrupt and arbitrary

*DMR accused of victimising mining companies by ordering shutdowns  
High Court criticises officials for gross abuse of powers in closing down of brickworks  
Kumba Iron Ore finally wins eight-year battle for mining licence unlawfully withheld*

Mpumalanga department abandons licensing “irregularities” in Pilgrims’ Rest  
Department of Social Development unlawfully cancels registrations of 37 000 NGOs  
Constitutional Court reminds Free State education officials their powers are limited by law



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High Court tells higher education minister to respect autonomy of universities

Police minister confirms he summoned riot police to Parliament against the rules

Defence minister orders state aircraft to help person enter the country illegally

### **Bending the rules/selective enforcement/dilatory conduct/payment failure/impunity**

Council for Medical Schemes accused of bending solvency rules for state scheme

Arms manufacturer Denel seeks exemption from expenditure rules it ignored

SARS commissioner accused of tardiness in suspension of colleague over suspicious deposits

“Hounding” of finance minister contrasted with dilatory investigation of Prasa fraud

Prasa chairman complains of political interference with the investigation

Efforts against finance minister contrasted with failure to investigate illegal aircraft use

National Prosecuting Authority’s failure to investigate suspicious transactions queried

Standing committee on public accounts criticises slow-coach Hawks on corruption

Co-operative governance minister complains of failure to punish municipal wrongdoers

Independent audit board says police fail to respond to reports of irregularities

Fraud charges against prosecutor Nomgcobo Jiba withdrawn by Shaun Abrahams

Junior police officers disciplined and dismissed but seniors get lenient treatment

Acting national police commissioner says “high-ups” tell police whom to investigate

High Court grants urgent order for evictions after police fail to act against land invasion

*Junior police officers disciplined and dismissed but seniors get lenient treatment*

*Acting national police commissioner says “high-ups” tell police whom to investigate*

Public protector finds council did not act against councillor encouraging illegal occupations

Cable theft charges withdrawn after pressure from ANC councillor on South Coast

Justice minister says provinces spent R237 million on legal fees over payment failures

SCA criticises “arrogance” of Free State MEC for refusing to pay a contractor for work

Company in business rescue says corruption one reason why government often fails to pay

High Court sets aside flawed ministerial decision not to release Clive Derby-Lewis

High Court queries parole process that keeps Janus Walusz in prison

Wits Justice Project says prisoners unlawfully denied parole for refusing to admit guilt

Democratic Alliance queries “suspicious” failure to act against illegal mining

### **Illegal appointment/dismissal/suspension/failure to appoint/promote**

Democratic Alliance says water board chairman’s renewed appointment is unlawful

Deputy minister queries ambassadorial appointment of convicted drug trafficker

Constitutional Court rules police minister had no power to suspend Robert McBride

Democratic Alliance says police minister has “fallen foul of the law so many times”

Police minister admits failing to inform Parliament of appointment of Hawks chief

Judge of North Gauteng High Court says Hawks chief biased and dishonest

Senior magistrate still in office in KwaZulu-Natal despite complaint of bribery

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SCA refuses SABC boss leave to appeal against decision that his appointment was unlawful  
Labour Court finds labour minister unlawfully removed one of her officials  
CCMA finds white man unlawfully passed over for promotion in North West province

*SCA suggests high-handed officials be held personally liable for costs of unlawful dismissals*

*Police officer promoted to rank of general despite charges laid against her  
More than 300 police officers appointed despite conviction for murder and other crimes*

Constitutional Court orders promotion of coloured prison employees unlawfully denied it  
Labour Court requires amendments to police employment equity plan  
Labour Court orders promotion of white man unlawfully denied it in Tshwane  
Eastern Cape High Court invalidates appointment made according to “political directive”  
Attorney says state employees paid off in return for silence over “dodgy dismissals”  
SCA suggests high-handed officials be held personally liable for costs of unlawful dismissals  
Police officer promoted to rank of general despite charges laid against her  
More than 300 police officers appointed despite conviction for murder and other crimes  
Naval officer reinstated despite regulations against employing persons with criminal records  
Courts set aside appointment of Menzi Simelane as national director of public prosecutions

#### **Irregular/wasteful expenditure/sales/misappropriation/procurement**

Auditor general finds sale of the country’s oil stockpile to have been illegal  
Treasury says proposed joint venture between Denel and a Gupta company is unlawful  
Finance minister says state-owned enterprises have no control mechanisms  
Democratic Alliance reports “staggering” waste and corruption in local councils  
Auditor general’s office says regulations against misconduct are not enforced  
Auditor general says millions in tenders are awarded to family members  
Accountant general says irregular government expenditure doubles annually  
Department of Higher Education accused of trying to “capture” skills funds  
Higher education minister found to have dismissed and appointed people unlawfully  
Public protector declares police accommodation leases to be unlawful and improper

*Auditor general says millions in tenders are awarded to family members  
Accountant general says irregular government expenditure doubles annually*

Helen Suzman Foundation says SABC board should be prosecuted for “golden handshakes”  
Foundation also says government spends millions on fruitless legal battles  
Independent consultant says state has “hopeless record” in wasteful appeals

#### **Unlawful action/behaviour/confiscation of goods/assets**

Finance minister says government intervention with Gupta banks would be unlawful  
Suspensions voiced over transfer of funds from mine rehabilitation trust fund  
Minerals minister advised his interventions with Gupta banks would be unlawful

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High Court finds clerks in magistrates' courts issued unlawful salary attachment orders  
Johannesburg police accused of illegally confiscating goods from 7 000 hawkers  
Johannesburg council faces damages claim on behalf of hawkers whose goods were trashed

### **Illegal deportation/rendition/entry refusal**

Judge in Omar al-Bashir case says immigration officials have previously ignored court orders  
Immigration officials in Cape Town ignore judge's order not to carry out a deportation  
Department of Home Affairs officials unlawfully deport family to Mozambique

### **Obstruction of justice/delay/interference/unlawful dropping of prosecutions**

Police commissioner tells lawyers not to comply with Farlam commission requests  
High Court strikes two top prosecuting officials from the roll for protecting alleged criminal  
Top prosecuting officials accused of victimising colleagues going after criminals

*High Court sets aside "irrational" decision to drop criminal charges against Mr Zuma*

*Mr Zuma and the National Prosecuting Authority both appeal this judgement*

Agriculture, forestry, and fisheries minister promises to stop prosecutions for strike violence  
Zuma associate convicted of making corrupt payments to him but Zuma charges dropped  
High Court sets aside "irrational" decision to drop criminal charges against Mr Zuma  
Mr Zuma and the National Prosecuting Authority both appeal this judgement  
Judge attacks Department of Justice for six-year delay in giving prisoners trial record  
Wits Justice Project says 11 people charged with murder have had case postponed 50 times

### **Unlawful arrest/detention/banning/surveillance/treatment/escape**

Police face 389 charges in relation to escapes from their custody  
High Court judge awards man R2.8 million for unlawful arrest and detention  
Police pay out R203 million for wrongful arrests in 2015/2016  
High Court orders payment of damages to Mrs Derby-Lewis for unlawful arrest  
High Court orders release of journalist unlawfully detained by Hawks  
Lawyers for Human Rights says asylum seekers are repeatedly wrongfully detained  
Constitutional Court says Pollsmoor prison ignored own regulations for combating TB  
Judge of that court says prison conditions still not properly addressed  
Former intelligence minister says intelligence agents are working for the ANC  
Offices of persons seeking "regime change" reportedly broken into

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Parliamentary committee reports thousands of unlawful interceptions of communications*

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Democratic Alliance says government agents are unlawfully spying on individuals  
Law firm says municipalities are prohibiting gatherings unlawfully

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Municipalities accused of making it more difficult to protest lawfully

### **Unlawful use of violence by police/prison warders**

Police accused of provoking violence by protesters

Police minister says 86 policeman lost their lives in a year

University research unit says 43 protesters killed by police over 10 years

In 2014/2015 there were 44 convictions of police for killings, torture, assault, and rape

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*Torture by the police said to be standard practice*

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Torture by the police said to be standard practice

Government says it has spent almost R1 billion in legal fees in past year defending itself

Police pay out R1.73 billion in legal fees, damages, and settlements over four years

IPID spokesman says police disciplinary procedures are laughable

Former intelligence minister calls on Mr Zuma to stop descent into police state depravity

Allegations made of unlawful administration of electric shocks in prisons

Police kill 34 miners at Marikana in 2012 in what many believe is a massacre

Police officers acquitted of murder of Andries Tatane in Ficksburg in 2011

Eight former policemen convicted of murder of Mozambican taxi driver in 2013

Convictions of police for use of excessive force said to be the exception rather than the rule

Deputy minister orders police to shoot to “kill the bastards”

### **“State capture”/“rogue” state/corruption**

Afriforum and Paul O’Sullivan launch anti-corruption unit against police criminality

Major criminal offers to turn state witness to nail his criminal associates in the police

*Chairman of AngloGold Ashanti says Mr Zuma is “sponsor-in-chief” of corruption*

*ANC secretary general Mantashe says in 2016 “our movement” must be saved from capture*

Chairman of AngloGold Ashanti says Mr Zuma is “sponsor-in-chief” of corruption

ANC secretary general Mantashe says in 2016 “our movement” must be saved from capture

ANC secretary general Motlanthe says in 2007 that corruption is worse than anyone imagined

*BusinessDay* claims entire towns and departments are in the hands of crime syndicates

Corruption Watch says many public sector institutions are in the hands of syndicates

Journalists and businessmen say South Africa is becoming a gangster state

### **Whitewashes**

Seriti commission into arms deal seen as yet another whitewash thereof

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## BLOW-BY-BLOW ACCOUNT

### Unconstitutional action

- At the end of March 2016 the Constitutional Court handed down a unanimous judgement that President Jacob Zuma had “failed to uphold, defend, and respect the Constitution as the supreme law of the land”. His failure was “manifest from the substantial disregard for the remedial action taken against him by the public protector in terms of her constitutional powers” after she had made adverse findings against him in a report stipulating that he should repay part of the R264 million spent from public funds on his private country estate at Nkandla in KwaZulu–Natal. (He then paid back R7.9 million, having evidently obtained the funds against a mortgage on the property held by the hitherto unknown VPS Mutual Bank, in which the Public Investment Corporation has invested on behalf of the Government Employees Pension Fund.)

*At the end of March 2016 the Constitutional Court handed down a unanimous judgement that President Jacob Zuma had “failed to uphold, defend, and respect the Constitution as the supreme law of the land”.*

- The court also ruled that Parliament had violated the Constitution by passing a resolution purporting to absolve Mr Zuma from complying with the public protector’s report on Nkandla.

- As of the end of September 2016, President Zuma had still not signed the Financial Intelligence Centre (FIC) Amendment Bill into law despite the fact that it had been passed by Parliament in May. The bill is designed to tighten up the country’s financial control system to combat money laundering and other crimes and ensure that it measures up to world standards, especially in monitoring influential and prominent persons in both the public and the private sector. A financial journalist, Bruce Whitfield, said that the bill was designed to keep politicians honest and to put the monitoring of “dodgy-looking transactions on to financial institutions” but that it had been delayed through “intense lobbying”. Some lobbyists claimed that the bill was unconstitutional, but the Council for the Advancement of the Constitution said that if Mr Zuma had reservations about the constitutionality of the bill he was obliged to refer it back to Parliament, failing which he had to sign it. A former finance minister, Trevor Manuel, said Mr Zuma would be violating his oath of office if he failed to sign. The FIC said that in 2015/2016 it had received reports of more than 180 000 suspicious transactions, blocked R185 million in suspected proceeds of crime, and assisted with nearly 2 000 national and international criminal investigations.

*Judge Carole Lewis said on behalf of a unanimous court that it was not the broadcast that impaired Parliament’s dignity but the behaviour of its MPs and parliamentary officials.*

- In September 2016 the Supreme Court of Appeal (SCA) ruled that Parliament’s policy of not allowing disruptions of its proceedings to be broadcast was unconstitutional as it violated the principle of an open parliament. Also unconstitutional, said the court, was the use of signal jamming equipment to block mobile devices without the permission of the speaker of the National Assembly and the chairperson of the National Council of Provinces (NCOP). Rejecting the speaker’s argument that the policy was reasonable as it protected the dignity of Parliament, Judge Carole Lewis said on behalf of a unanimous court that it was not the broadcast that impaired Parliament’s dignity but the behaviour of its MPs and parliamentary officials. Parliament had blocked televised broadcasts and jammed other signals when the Economic Freedom Fighters disrupted proceedings in 2015 demanding that Mr Zuma “pay back the [Nkandla] money”, leading to fisticuffs and their being forcibly removed by security personnel summoned by the minister of police (see below).



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- The Western Cape High Court ruled in September 2011 that the Judicial Service Commission had acted unconstitutionally in April that year in failing to fill two vacancies on the Cape bench when there were suitable candidates available.

- An attempt by Mr Zuma to reappoint Sandile Ngcobo for a further term as chief justice was thwarted in August 2011 when Judge Ngcobo himself withdrew his acceptance of the invitation to extend his term for five years. His term could only have been extended by legislation challenged as unconstitutional. Judge Ngcobo said he did not wish to be a party in litigation as to whether or not he should continue in office.

- In March 2011 the Constitutional Court declared sections of the legislation that established the “Hawks” to be unconstitutional. The Hawks, officially known as the Directorate for Priority Crime Investigation, are a unit of the South African Police Service. They replaced the “Scorpions”, officially known as the Directorate of Special Operations, who were a unit of the National Prosecuting Authority (NPA). The court said that the Hawks were not sufficiently protected from political meddling and instructed Parliament to bring the law into line with their judgement within 18 months. Abolition of the Scorpions in 2008 followed a decision taken by the ANC at its conference in Polokwane in December 2007 after they had pursued 18 criminal charges comprising 783 itemised counts against Jacob Zuma which the NPA then dropped, clearing the way for him to become president of South Africa in 2009 (see further below).

*The Constitution, however, stipulates that only the president may authorise the deployment of the defence force and that he must promptly inform Parliament when he does so and for how long deployment will last.*

- Despite being instructed to remedy the defects in the legislation within 18 months, Parliament failed to do this. It was then given another year, but the result was still unsatisfactory. Accordingly, in November 2014 the Constitutional Court rewrote sections of the legislation itself in an attempt to insulate the Hawks from political interference.

- In January 2012 it was alleged by security specialists and constitutional lawyers that the South African National Defence Force was being unlawfully used in both Cape Town and Johannesburg in support of the police in conducting drug raids and seizing counterfeit products. The Ministry of Defence claimed that the law allowed for soldiers to do anything as long as they were asked to by the police, that this was “standard procedure”, and that soldiers had been used in terms of a general co-operation agreement with the police dating back to 2001. The Constitution, however, stipulates that only the president may authorise the deployment of the defence force and that he must promptly inform Parliament when he does so and for how long deployment will last.

### **Unconstitutional laws**

- In October 2016 Parliament’s portfolio committee on mineral resources dismissed President Jacob Zuma’s objections that sections of the Mineral and Petroleum Resources Development Amendment Bill of 2013 were unconstitutional and inconsistent with South Africa’s international obligations. The committee recommended that the National Assembly put the bill to a vote before sending it to the NCOP.

- The Constitutional Court in September 2016 struck down parts of the Independent Police Investigative Directorate (IPID) Act of 2011 permitting the minister of police to suspend the head of IPID. It said they did not insulate him sufficiently from political interference and gave Parliament two years to amend the act to bring it into line with the Constitution. The minister, Nkosinathi Nhleko, subsequently asked Parliament to consider instituting disciplinary proceedings against the head of IPID, Robert McBride, but it missed the deadline for doing so, and Mr McBride returned to work when his suspension lapsed on 19th October.

- According to Martin van Staden, Southern African regional director of African Students for Liberty, certain sections of the South African Citizenship Act of 1995 are unconstitutional. This is because they empower the minister of home affairs to “deprive” South Africans of their citizenship on certain grounds, among them “public interest”, even though the Constitution itself provides that no citizen may be deprived of citizenship.

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- In 2010 the North Gauteng High Court invalidated regulations establishing a price list for private health care. The health department had failed to comply with the Constitution and had acted in a procedurally unfair manner, with an attitude of “disdain and disregard” for the rights of the Hospital Association of South Africa.

*In May 2012 Max Sisulu, speaker of the National Assembly, expressed his “deep concern” over the volume of legislation being returned to the assembly for correction after the NCOP or the courts had found it to be unconstitutional. He referred in particular to legislation dealing with state information, films and publications, traditional courts, and legal practice.*

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### **Unconstitutional policies**

- The policy of promoting a National Democratic Revolution in South Africa, to which the African National Congress (ANC), the South African Communist Party (SACP), and the Congress of South African Trade Unions (Cosatu) are committed, has been criticised by various organisations, among them the South African Institute of Race Relations (IRR), the FW de Klerk Foundation, and Accountability Now as in conflict with the Constitution. Whereas the Constitution embraces the principle of the separation of powers, revolutionary ideology envisages the capture of all centres of power by the ANC and its allies and the conflation of party and state. This poses a threat to the independence of the judiciary, as well as of other institutions such as the National Prosecuting Authority (NPA).

- Also in conflict with the Constitution is the revolutionary policy of deploying loyal cadres of the ANC and its allies to all centres of power, as well as to jobs in national, provincial, and local government, and state-owned enterprises. One consequence of this is that loyalties of public servants are often to political parties, in conflict with the constitutional requirement that public administration be impartial and without bias.

*Mr Zuma ordered in 2015 that there should be no fee increases at universities in 2016. According to the Democratic Alliance his declaration “usurped the statutory rights of universities”. However, no university chose to challenge it.*

- Strict application of racial considerations in appointments and promotions in the public sector may also be in conflict with the constitutional requirement that public administration needs to be only “broadly representative of the South African people”. Court cases arising from some of these policies are dealt with in various sections below.

### **Unlawful orders**

- The public protector stated that a directive by the minister of transport, Dipuo Peters, to the Passenger Rail Agency of South Africa (Prasa) to halt a forensic investigation into tender irregularities was unlawful. The chairman of Prasa, Popo Molefe, who ordered the investigation after receiving a report from the public protector, said that the minister had no power to stop the investigation and that her instruction was a violation of the Constitution and of the Public Finance Management Act of 1999.

- Mr Zuma ordered in 2015 that there should be no fee increases at universities in 2016. According to Belinda Bozzoli MP of the Democratic Alliance (DA), the official parliamentary opposition, his declaration “usurped the statutory rights of universities”. However, no university chose to challenge it.

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## Law-making procedures not followed

- In July 2016 the Constitutional Court struck down the Restitution of Land Rights Amendment Act of 2014 on the grounds that Parliament had not allowed for sufficient public participation as required by the Constitution before enactment.

- Peter Leon, a leading lawyer, said in August 2016 that three other bills had also been rushed through Parliament “without adequate public input”. These were the Private Security Industry Regulation Amendment Bill of 2012, the Mineral and Petroleum Resources Development Amendment Bill of 2013, and the Expropriation Bill of 2015. (At the time of writing, none of the three bills had been signed, evidently because Mr Zuma was himself concerned about the constitutionality of these measures and the absence of adequate public consultation.)

*Confusion, controversy, and speculation have been rife over the past few years over whether or not the government has committed itself to procuring 9 600 megawatts of nuclear energy from a Russian company, Rosatom, while endeavouring to keep its dealings secret.*

## Parliamentary rules violated/institutions undermined

- Opposition parties accused the minister of energy, Tina Joemat-Petterson, of failing to comply with parliamentary rules requiring her to hand over various documents requested by Parliament’s portfolio committee on energy. The minister said that the documents in question, relating to procurement of nuclear energy, were privileged. Confusion, controversy, and speculation have been rife over the past few years over whether or not the government has committed itself to procuring 9 600 megawatts of nuclear energy from a Russian company, Rosatom, while endeavouring to keep its dealings secret. The chairman of the committee, Fikile Majola, said that Parliament’s legal advisers had told him that it was up to him rather than the minister to determine whether documents should be classified or not. He said he would ask the minister to supply them by 11th October 2016. “Parliament will have to see all the documents,” he said. The minister then supplied the documents.

- However, she had still failed to supply the committee with a full copy of a forensic report into Petro SA’s Ikwezi project, which had resulted in a loss of some R14.5 billion.

- Lindiwe Sisulu, minister of defence and military veterans, said in 2010 that she would boycott the parliamentary standing committee on public accounts (Scopa) for treating her like a “recalcitrant child” after the committee had reprimanded her for being unavailable on three occasions to attend meetings to answer questions.

- An investigation by Scopa into a series of arms purchases worth almost R47 billion was thwarted by the government, the ANC, and the speaker of the National Assembly, Frene Ginwala, soon after Scopa began its probe in 2000. Although the committee, chaired as usual by an opposition MP, began its work in a nonpartisan fashion, the ANC soon used its majority to block its work. This included the demotion of the senior ANC member of Scopa, Andrew Feinstein. The committee’s chairman, Gavin Woods of the Inkatha Freedom Party, who later resigned, said that the government had gone to “extraordinary lengths to sabotage the investigations”. President Thabo Mbeki denounced critics of the arms deal as racists, while the finance minister, Trevor Manuel, was among those who defended the deal. Jacob Zuma, then deputy president, also denounced Scopa.

## Court orders ignored/flouted/contradicted/defied/appealed

- In March 2016 the SCA confirmed a ruling by the North Gauteng High Court that the government had acted unlawfully in failing to arrest the Sudanese president, Omar al-Bashir, when he visited South Africa in June 2015. Mr Bashir was helped to leave South Africa in defiance of a court order that he be arrested as

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he had been indicted by the International Criminal Court (ICC) for war crimes, crimes against humanity, and genocide in which 300 000 people had died, tens of thousands of women had been raped, and 2.5 million people had been rendered homeless. Although the government claimed that visiting heads of state enjoyed diplomatic immunity, the SCA said that such immunity was expressly excluded in this case by South African legislation, the Implementation of the Rome Statute of the International Criminal Court Act of 2002.

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- Commenting on the government's failure to comply with the initial high court order by Judge Hans Fabricius, Judge Dunstan Mlambo said on behalf of a full bench of the North Gauteng High Court that "if the state, an organ of state, or a state official does not abide by court orders, the democratic edifice will crumble stone by stone until it collapses and chaos ensues". The Rome Statute, having been domesticated into South African law, could not be "displaced by a notice promulgated by the minister nor by a cabinet decision". Judge Mlambo invited the national director of public prosecutions to consider whether criminal proceedings were appropriate. A former judge of the Constitutional Court, Richard Goldstone, said that allowing the Sudanese president to leave was the first clear case in which the government had flouted an order of one of the courts.

- In October 2016 the minister of justice, Michael Masutha, announced that South Africa would withdraw from the ICC. A bill to repeal the Rome Statute Act would be introduced, while the government's application to the Constitutional Court for leave to appeal against the al-Bashir decisions would be withdrawn. The DA said it would go to court to challenge the decision to quit the ICC on the grounds that the decision had not been authorised by parliamentary resolution.

- In May 2016 the SCA ruled against the minister of communications, Faith Muthambi, on "encryption" of set-top boxes on television sets. The Cabinet decided that encryption was necessary, but she had published specifications excluding it. However, the minister argued that her interpretation of the Cabinet's policy was correct, and that the judgement would make little difference to its implementation.

*The SCA said a former compensation commissioner, "a senior state official entrusted with a vitally important social welfare responsibility and vast public funds (unnecessarily wasted by his persistently contemptuous conduct)", had shown "utter disdain for the court's procedures and its orders. The worst affront to the court is that he could not even be bothered to explain why he failed to comply with its order."*

- In April 2016 the SCA sentenced a former commissioner of the Compensation Fund to three months' imprisonment suspended for five years after finding him guilty of contempt of court. He had failed to comply with an earlier settlement order to pay a company handling payment claims from doctors providing services to persons injured at work. The SCA said that the former commissioner, Shadrack Mkhonto, had repeatedly breached the order and flouted a directive from a lower court. "It shows the utter disdain of the commissioner, a senior state official entrusted with a vitally important social welfare responsibility and vast public funds (unnecessarily wasted by his persistently contemptuous conduct), for the court procedures and its orders. The worst affront to the court is that he could not even be bothered to explain why he failed to comply with its order." The company acting for the doctors said it had submitted 98 000 claims totalling R278 million that had yet to be assessed by the fund. It was still awaiting payment of a further 36 000 claims, worth R180 million, for which the fund had accepted liability. Since leaving the fund, Mr Mkhonto

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had become chief operations officer in the Department of Labour.

- The SCA declared in 2015 that it was “a most dangerous thing for a litigant, particularly a state department and senior officials in its employ, to wilfully ignore an order of court”. Its judgement upheld that of the Eastern Cape High Court in 2012 ordering the Department of Home Affairs to reopen a refugee reception centre in Port Elizabeth it had closed down. The department had ignored the order, and then appealed to the SCA against an enforcement order which had also been granted against it.

- Lawyers for Human Rights said that the parliamentary portfolio committee on home affairs, which is supposedly the watchdog over the department, had protected the director general of home affairs, Mkuseli Apleni, from answering any questions about numerous court orders striking down various decisions to close refugee reception offices in Johannesburg, Port Elizabeth, and Cape Town. The committee had itself also been quiet about the department’s “near-daily flouting of the Immigration Act [of 2002] and its regulations, the Refugees Act [of 1998] and its regulations, and the Citizenship Act”. The department’s actions included “the unlawful detention and deportation of asylum seekers and refugees”. The department had also failed to abide by court orders to release unlawfully detained children.

*The SCA said that failure to supply the textbooks was an infringement of pupils’ rights to basic education. “In this case we are dealing with the rural poor and with children; they are deserving of constitutional protection.”*

- In April 2015 the Constitutional Court upheld the judgement of a lower court that there had been a transfer of business between City Power in Johannesburg and another company, Grinpal, and that City Power was obliged to absorb Grinpal’s employees, which it had failed to do. Some of the employees were now destitute, while their insurance policies had lapsed, leading to their being blacklisted. After losing an earlier appeal, City Power took the case to the Constitutional Court, where it lost again.

- In December 2015 the SCA dismissed the appeal of the minister of basic education, Angie Motshekga, against a decision of the North Gauteng High Court ordering her to deliver textbooks to schools in Limpopo by the middle of 2012. The SCA said that failure to supply the textbooks was an infringement of pupils’ rights to basic education. “In this case we are dealing with the rural poor and with children,” the SCA said. “They are deserving of constitutional protection.” In October 2016 the Legal Resources Centre prepared to launch an action against the minister on behalf of pupils at two high schools in the Eastern Cape for non-delivery of textbooks.

- The Eastern Cape High Court in December 2014 ordered the Eastern Cape education department to hire an administrator to ensure that it obeyed an order to pay R81 million to more than 90 schools.

- In April 2012 the North Gauteng High Court ordered the government to pay R400 000 to a private company after the police failed to carry out an interdict. The order was to keep striking workers away from a mine entrance and so allow unhindered access to the mine. But the police officer in charge ignored the order and said it had nothing to do with him. *The Citizen* commented in an editorial that strikers in South Africa got away with murder, while scarcely any arrests had been made. “Part of the problem is obviously gross dereliction of duty by police.”

- In January 2010 a member of the South African Abalone Industry Association brought an application for contempt of court against the then agriculture, forestry, and fisheries minister, Tina Joemat-Petterson, for failing to obey an order of the Western Cape High Court that he be issued with three permits. The permits were then issued following an out-of-court settlement which was made an order of court.

- In October 2010 Jackie Mackay, deputy director general of immigration services in the Department of Home Affairs (DHA), was found guilty of contempt by the North Gauteng High Court. He had ignored two orders by an acting judge to release a woman who had been unlawfully detained. The woman, a Chinese national, had visited China to see a new grandchild. However, on her return to South Africa with a valid work permit, attempts had been made to carry her forcibly on to an aircraft to deport her. DHA officials dismissed



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the order for her release as “just a piece of paper”, prompting a telephone call from the judge, on whom Mr Mackay slammed down the telephone. It was only when a third court application was threatened that the woman was released.

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- The premier of Gauteng, Nomvula Mokonyane, delayed for a year (until February 2012) before complying with a high court order instructing her to pay R9 million in damages for a child who had suffered brain damage through the negligence of a provincial hospital.
- In May 2012 the deputy chief justice, Dikgang Moseneke, criticised the “tardiness of government institutions in implementing court orders promptly”. He said that the Constitutional Court, rather than the government, had been at the forefront of giving effect to the “pro-poor stance” in the Constitution.
- *BusinessDay* commented in an editorial in November 2013 that “there have been numerous cases of cabinet ministers ignoring court orders”.
- Residents of the Johannesburg suburb of Bordeaux South obtained a court order against the city council in March 2010 allowing them to erect structures to control access and so combat crime. The city told them it intended to remove the structures anyway, forcing them to return to court for another order, against which the city said it would appeal. The residents’ attorney accused the council of “vexatious litigation”.
- In July 2015 the Socio-Economic Rights Institute of South Africa accused the Johannesburg City Council of repeatedly ignoring court orders to provide emergency shelter to 180 people living in “deplorable” conditions in the city. The people in need of shelter had agreed to an eviction order provided they were given alternative accommodation, which the council had undertaken to supply. The institute said that the city had not only failed to comply with court orders but that it had also “failed to comply with court orders seeking to compel it to comply with other court orders”.
- In December 2010 a full bench of the South Gauteng High Court found the eviction of 253 people from a building in Jeppe Street in Johannesburg to have been illegal as it was implemented without a court order. The court said that the owners of the building, the security company that carried out the eviction, and the local police station commander were in contempt of court for evicting the occupants without an order. They were given suspended sentences of fines and imprisonment. Teboho Mosikili, an attorney representing the occupants, said that unlawful evictions were common occurrences in Johannesburg’s inner city, which was “undergoing a process of gentrification with no affordable decent accommodation available to poor people currently living there.”
- In July 2010 the South Gauteng High Court ordered the Johannesburg city council and its metropolitan police to rebuild homes in Kliptown they had destroyed while carrying out an unlawful eviction. The city said it wanted to upgrade the area, which is part of Soweto, and that the residents were unlawful occupiers who were being obstructive, making the success of housing delivery projects a huge challenge for the city.
- In August 2007 the North Gauteng High Court found that the minister of safety and security, Charles Nqakula, had failed to comply with an order of the SCA that the police should rebuild shacks they had earlier burnt down. Judge Bill Prinsloo said the minister should go to prison until such time as the shacks were rebuilt. The sentence was suspended and the minister lodged an appeal. The judge said that the time had arrived for a higher court to give guidance on the circumstances in which a minister or other official could be imprisoned for contempt of court.
- In March 2010 Zureena Agulhas, master of the Western Cape High Court, failed to obey a judgement instructing her to pay more than half the tariff rate to the liquidator of an insolvent company. Ms Agulhas

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claimed the right to “interpret “the judgement and paid only the tariff rate. When the matter went back to court, Judge Wilfrid Thring said that she had opted to disobey a court ruling and had acted “unlawfully and with gross impropriety”.

- In 2008 the South Gauteng High Court ordered the National Prosecuting Authority to return assets worth some R280 million seized from a businessman in the run-up to his trial for defrauding the South African Bank of Athens of some R10 million. By December 2010 the assets had still not been returned, obliging the businessman to bring a civil claim against the NPA.

- In August 2006 the KwaZulu-Natal High Court said that the ministers of health and correctional services were in contempt for failing to heed an instruction to supply antiretroviral treatment to HIV-positive inmates of the Durban-Westville prison.

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### Attacks on the courts

- In an interview shortly after he was elected president in 2009, Jacob Zuma criticised the Constitutional Court for regarding itself as being “close to God”. He professed perplexity as to why the court should exercise authority over the wishes of the popularly elected majority party. In July 2011 he warned the country's judges to stay on their side of the fence and leave politics to politicians and governance to the government.

- In January 2016 Mr Zuma criticised “low intensity law-fare” in the form of court challenges aimed at diverting “legitimate democratic outcomes”.

- Over the years there have been numerous public attacks on the courts by ministers and other politicians. In August 2011 the secretary general of the ANC, Gwede Mantashe, said that the judiciary was becoming a form of opposition: “You cannot have a judiciary that seeks to arrest the functioning of government.” The following year he said that courts should not interfere with the manner in which the government managed its finances. In 2015, following the ruling of the High Court on failure to arrest Omar al-Bashir, he said sections of the judiciary were driven to “create chaos for governance”.

- In 2015 Blade Nzimande, secretary general of the South African Communist Party (SACP) and minister of higher education, called on judges to stop “ideological blackmail” because they were running “the danger of undoing our constitutional democracy through judicial overreach that undermines principles of majority rule and separation of powers”.

*In August 2015 a former national director of public prosecutions, Vusi Pikoli, said that the reason the executive branch of government frequently found itself having to answer to the courts was that politicians were loath to obey the law.*

- A meeting of the ANC, the SACP, and Cosatu said that “certain regions and judges are consistently against the state”.

- In August 2015 a former national director of public prosecutions, Vusi Pikoli (see below), said that the reason the executive branch of government frequently found itself having to answer to the courts was that politicians were loath to obey the law. In answer to government criticisms of “judicial overreach” and that the courts were not “respecting the separation of powers”, Mr Pikoli said they were empowered by the Constitution to administer justice to those who sought it.

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## Warnings by judges

- Following renewed attacks on the courts in the wake of the Omar al-Bashir judgement, 27 of the country's most senior judges jointly warned against "the dangers of repeated and unfounded criticism". The chief justice, Mogoeng Mogoeng, said that the rule of law was the cornerstone of constitutional democracy and that "as a nation, we ignore it at our peril". He and his colleagues wished to assure the nation and the world that South Africa's judges remained steadfast in their "sacred" obligations to uphold and protect the Constitution and their oaths of office. Judge Mogoeng added that court orders had by and large been honoured by other arms of state, but that in the "few instances" where they had not, the effect was to undermine the rule of law.

## Statutory institutions undermined/attacked

- By October 2010, according to the public protector, Thuli Madonsela, instances of "government stonewalling" of her queries, recommendations, and directives had risen to some 1 700. By June 2011 the situation had little improved, prompting her to warn against allowing this "recipe for impunity" to persist.

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- In March 2011, some two years into her non-renewable seven-year term of office, Ms Madonsela was the target of a visit by two crime intelligence officers which the ANC described as a "suspicious raid." The visit followed her finding in February 2011 that the then police commissioner, General Bheki Cele, had played a role in signing a R500 million lease for new police headquarters which never went out to tender.

- In July 2011 there were reports that Ms Madonsela was about to be arrested on charges of corruption (which never materialised).

- Shortly before these reports, she had said that the government failed to implement the "remedial action" she required in cases involving corruption, unethical conduct, and abuse of power and state resources. Ignoring such action meant there would be no real accountability or incentive to change; it was a recipe for impunity. Her office said that organs of state ignored the constitutional and statutory rights of complainants to follow cost-free routes as opposed to court processes that would cost more money. Even the South African Board for Sheriffs had failed to comply with her findings. Some of the lawyers advising the state were part of the problem, because they had become "superimposed as review panels" of her decisions. However, she said, only courts could review her decisions. These problems persisted until the expiry of Ms Madonsela's term of office in October 2016.

- In 2014 a deputy minister insinuated that Ms Madonsela was a Central Intelligence Agency (CIA) spy charged with creating a puppet regime in South Africa for the United States of America. In 2015 she said that her office had received unprecedented "vitriolic attacks" after her findings against Mr Zuma in respect of his Nkandla estate.

- In 2016 she said that people tended to light fires behind her back every time she conducted investigations they were not happy with.

- Glynnis Breytenbach, a former senior prosecutor in the National Prosecuting Authority, was facing charges at the time of writing for defeating the ends of justice. Ms Breytenbach, now an opposition MP, had earlier been cleared on disciplinary and other charges levelled against her in connection with her investigations of the Kumba/Imperial Crown Trading issue (see below). She had resigned after being suspended for refusing to drop criminal charges against Lieutenant-General Richard Mdluli (see below), a former head of crime intelligence known for his pledges of loyalty to Mr Zuma. She had been the victim of an attempt to

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force her off the road, and had been shot at by unknown gunmen. Dead cats had also been found hanging on her gate.

- Mxolisi Nxasana, who served as national director of public prosecutions for about a year before leaving with a payout of R17.3 million in 2014, was asked to resign after it was discovered that he had not disclosed a murder charge on which he had been acquitted 30 years earlier. The Black Lawyers' Association asked why he was being pursued after his appointment for things that should have been investigated beforehand. Paul Hoffman of Accountability Now suggested that Mr Nxasana had been elbowed out to save Mr Zuma from answering the charges brought against him. Ms Breytenbach suggested that the reason the minister in the Presidency, Jeff Radebe, wanted Mr Nxasana out, was that he had refused to lay criminal charges against her while also withdrawing the appeal against the acquittal of General Booyens (see below). She said, "He saw that there was no case against me. He is an independent man and I think they are no longer happy that he is not playing according to their rules."

*Paul O'Sullivan, a private investigator looking into official corruption, was arrested in April 2016 by 15 Hawks officers on an aircraft about to leave for London, where he intended to "tell the world that South Africa has been taken over by a corrupt regime" combining Jacob Zuma and the Gupta family.*

- In April 2014 a Labour Court judge, Robert la Grange, ordered the police to redeploy Colonel Kobus Roos to an audit job from which he had been removed by General Mdluli after producing a dossier alleging that crime intelligence members were involved in corruption, looting, and other crimes. Colonel Roos said that the fraud he had uncovered was only "the tip of the iceberg". The judge said that instead of being praised for his excellent work he had been "placed in a state of internal exile" when he was moved to a "meaningless" job where he had sat idle.

### **Attacks on private whistleblowers**

- Paul O'Sullivan, a private investigator looking into official corruption, was arrested in April 2016 by 15 Hawks officers on an aircraft about to leave for London, where he intended to "tell the world that South Africa has been taken over by a corrupt regime" combining Jacob Zuma and the Gupta family. He was charged with contravening the Citizenship Act by leaving South Africa on a foreign passport. An immigration lawyer said he had never heard of an arrest on these charges even though the law had come into force ten years previously. The normal procedure was a warning. Mr Sullivan's arrest appeared to be a case of selective enforcement of the law. The Department of Home Affairs was unable to say how many people had been charged under the Act, but that "we had to apply the law to the letter".

- In September 2016 Mr O'Sullivan launched an application for an interdict against the Hawks, the NPA, the police, and the Department of Justice and Constitutional Development, claiming that their investigations into his affairs were politically motivated. In October 2016 Mr O'Sullivan's lawyers claimed that corrupt police officials had been involved in attempts to kill him on at least six occasions and that they had deliberately bungled a trap he had set to catch criminal conspirators.

- In March 2016 robbers broke into the offices in Johannesburg of the Helen Suzman Foundation and removed its computers. The director of the foundation, Francis Antonie, linked the robbery with the efforts of the foundation to interdict the head of the Hawks, Major-General Mthandazo Berning Ntlemeza, from exercising his powers pending a review of the processes leading to his appointment despite judicial findings impugning his integrity, honesty, and fitness (see below). The foundation had also challenged the constitutionality of the legislation governing the Hawks. In addition, it had gone to court to seek a commission of enquiry into the arms deal concluded in 1999.

- In July 2015 eight police officers raided the Johannesburg home of Hugh Glenister without a warrant. Mr Glenister had spent R3.5 million of his own money mounting a legal challenge to the disbanding of the

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Scorpions while also challenging the legislation establishing the Hawks. He suggested that the raid could be linked to his history of litigation and vociferous criticism of some politicians. The police said they had acted on a tip-off that there were drugs on his property.

*In July 2015 eight police officers raided the Johannesburg home of Hugh Glenister without a warrant. Mr Glenister had spent R3.5 million of his own money mounting a legal challenge to the disbanding of the Scorpions while also challenging the legislation establishing the Hawks.*

### **Unlawful harassment/prosecution**

- A former judge of the Constitutional Court and current chairman of Freedom under Law, Johann Kriegler, wrote in August 2016 that the finance minister, Pravin Gordhan, was the target of “persecution” by the Hawks. Despite having answered several detailed questions earlier in the year, and despite having been told in May by the Hawks that he was not a suspect, Mr Gordhan was summoned by them in August for a “warning statement”. However, said Judge Kriegler, the Hawks had no power to issue such a summons. If there were any charges against Mr Gordhan, the proper procedure was to formulate them and summon him to court to answer them. Instead the Hawks had mounted a public relations exercise in the glare of publicity and the “hint of something suspicious”. It was a “charade”, and an “affront to the rule of law” calculated to “smear” and “intimidate” Mr Gordhan – who declined to present himself to the Hawks, but said he would cooperate in any “bone fide investigation”.

- The case that Mr Gordhan supposedly has to answer is that he established a “rogue unit” at the South African Revenue Service (SARS) in 2007 when he was commissioner there. Although various accusations have been levelled against the unit, another former constitutional court judge, Zak Yacoob, said he had advised Mr Gordhan that there was nothing unlawful, let alone criminal, about it. Judge Yacoob blamed President Zuma for the decision to pursue Mr Gordhan and others involved with the unit seeking to uncover tax evasion.

- The pursuit of members of the unit by the Hawks was initiated by Mr Tom Moyane, who as tax commissioner is supposedly subordinate to Mr Gordhan as finance minister, but who instead enjoys the support of Mr Zuma, as does the head of the Hawks, General Ntlemenza. Having completed their investigation of Mr Gordhan, the Hawks handed their docket to the national director of public prosecutions, Shaun Abrahams, towards the end of September.

- Mr Gordhan told some of his staff that he was being persecuted for investigating irregular contracts with companies owned by the Gupta family but that he would not back down even if it meant dying to save the country from the “thieves”. A former ANC MP and member of the South African Communist Party, Raymond Suttner, said it appeared that Mr Gordhan and the National Treasury “stand as a barrier preventing wholesale looting of state resources”.

*In October 2016 Mr Gordhan was charged with fraud and theft arising from payments to a pension fund on behalf of a former SARS official, who was then supposedly unlawfully re-employed after taking early retirement. Freedom under Law dismissed the charges as “legally flawed and factually unfounded”.*

- In October 2016 Mr Gordhan was charged not in connection with the “rogue unit” but with fraud and theft arising from payments to a pension fund on behalf of a former SARS official, who was then supposedly unlawfully re-employed after taking early retirement. Freedom under Law dismissed the charges as “legally flawed and factually unfounded”. This view was widely echoed, and a number of senior ANC figures declared their support for Mr Gordhan. Mr Abrahams was widely condemned for bringing trumped-up



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charges, which Mr Gordhan “invited” him to withdraw after declining his invitation to make representations. Aaron Motsoaledi, the health minister, described the decision to prosecute Mr Gordhan as “a declaration of war: We want law and order – not institutions used to fight nefarious political battles”.

- In September 2016 the former head of the supposed “rogue unit”, Johann van Loggerenberg, published a book entitled *Rogue: The Inside Story of SARS’s Elite Crime-busting Unit*. Mr Van Loggerenberg and his team of investigators had been forced to quit. Judge Kriegler said that “impairing SARS’s capacity by blunting its investigative edge has been tantamount to sabotage”. Reviewing the book, a journalist on *BusinessDay*, Franny Rabkin, said its central premise was that the stories of the rogue unit were strategically placed leaks by sections of South African intelligence in cahoots with organised crime – in particular, the illicit tobacco industry – to shut down one of the most successful crime-busting units.

- Mzwanele (Jimmy) Manyi, a former director general of labour and government spokesman who now heads the Decolonisation Foundation, lodged a formal complaint in October 2016 with the Hawks against Kenneth Brown, chief procurement officer of the treasury. Mr Manyi questioned certain deposits into Mr Brown’s bank account. The allegations came at a time when Mr Brown said that fraud and waste accounted for between 30% and 40% of government procurement spending. The treasury said that it viewed the allegations in a serious light and that it hoped “Mr Manyi is raising this matter in good faith” and that it was not “a deliberate attempt to sow seeds of suspicion on the integrity of the treasury and cast aspersions on Mr Brown”. It said it had written to Mr Manyi and his foundation, as well as to the head of the Hawks, General Ntlemenza, to get the “purported dossier that supports these allegations”.

*The judge said that decisions by the acting national director of public prosecutions, Nomgcobo Jiba, to prosecute General Booyesen were arbitrary and unconstitutional in that they offended the principles of legality and the rule of law.*

- The KwaZulu–Natal High Court in September 2016 granted an application by Major–General Johan Booyesen, head of the Hawks in KwaZulu–Natal, to have charges of murder and racketeering against him set aside. The judge said that decisions by the acting national director of public prosecutions, Nomgcobo Jiba, to prosecute General Booyesen were arbitrary and unconstitutional in that they offended the principles of legality and the rule of law (see below). General Booyesen had long claimed that he was the focus of a campaign over several years to get rid of him because of his determination to pursue criminals in high places or with top–level political connections. The campaign included the reinstatement of criminal charges previously overturned in court. He wrote a book entitled *Blood on Their Hands* in an attempt to “expose those destroying the criminal justice system”.

- The national director of public prosecutions, Vusi Pikoli, was suspended by President Thabo Mbeki in 2007 and then fired by President Kgalema Motlanthe in 2009 for refusing instructions to desist from prosecuting the then police commissioner, Jackie Selebi, for corruption. Mr Pikoli was dismissed despite the finding of an enquiry under the former speaker of the National Assembly, Frene Ginwala, that he was a person of unimpeachable integrity and should be reinstated. He challenged his dismissal in court, but then settled for a payout of R7.5 million, so that the legality or otherwise of his dismissal never came to court.

- In June 2016 Freedom Front Plus, a small opposition party, laid charges against Panyaza Lesufi, MEC for education in Gauteng, for violating the Children’s Act of 2005 by exposing young children to psychological and social harm when he publicly attacked a crèche in Centurion outside Pretoria as “racist” and urged his followers to visit the crèche with him, saying he would “jump the fence if necessary”. The incident followed misrepresentation of a photograph showing a black toddler sitting alone at a table. The owner of the school said that she had subsequently received death threats and hate mail. Anton Alberts MP of FF Plus said that Mr Lesufi should have conducted a proper investigation before finding the school guilty and “tweeting” 20 000 followers about it.

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- In August 2012 two policemen who had been accused of intimidation, assault, and pointing a firearm at the driver of Winnie Madikizela–Mandela two years previously had the criminal case against them withdrawn. They had pulled over Mrs Madikizela–Mandela’s car for speeding but an altercation followed and she demanded that they apologise. When they refused they were charged. Said Constable Abel Twala: “I will not apologise for doing my job.” The case dragged on for two years in the face of claims that there was political interference, as several prosecutors withdrew.

*In August 2016 the High Court overruled a 9.4% electricity tariff increase approved by the National Electricity Regulator of South Africa (Nersa) as “irrational, unfair, and thus unlawful”. Eskom and Nersa have sought leave to appeal.*

- Carolyn Raphaely, a member of the Wits Justice Project, said that the minister of correctional services, Nosiviwe Mapisa–Nqakula, had acted contrary to the Correctional Services Act of 1998 by parading three prisoners before the media in March 2012 in an apparent “naming and shaming” exercise. The act, Ms Raphaely said, prohibited the parading of prisoners in front of cameras without their consent. The Law Society of South Africa criticised the minister on the same grounds.

### **Institutions/officials behave unlawfully/arrogantly/above the law**

- In August 2016 the High Court overruled a 9.4% electricity tariff increase approved by the National Electricity Regulator of South Africa (Nersa) as “irrational, unfair, and thus unlawful”. Eskom and Nersa have sought leave to appeal.

- The Labour Court in July 2016 ordered the reinstatement of eight SABC journalists whose dismissal had been unlawfully set aside. They said that the SABC’s policy of banning coverage of public protests was unconstitutional and that Parliament was in breach of the Constitution for not holding the public broadcaster accountable.

- In June 2016 the Constitutional Court ruled that the Independent Electoral Commission (IEC) had unlawfully failed to record and keep the residential addresses of voters. However, in order to enable the nationwide municipal elections on 3rd August to go ahead, the court suspended its order of invalidity for two years so that they would be ready in time for the general election in 2019. The case had its origins in allegations that voters had been bussed in for by–elections in some of the wards in the Tlokweng (North West) municipality in 2013. In an earlier decision the court had said that the IEC had a duty to provide the addresses of all voters on the roll, an instruction dating back to 2003, and that its failure to do so amounted to unlawful conduct.

*In August 2015 the North Gauteng High Court ordered the Department of Labour to hand over a safety report it had “unlawfully and invalidly” withheld. The report dealt with a fire which left 13 people dead but the department had refused to make the report available to their families.*

- In August 2015 the North Gauteng High Court ordered the Department of Labour to hand over a safety report it had “unlawfully and invalidly” withheld. The report dealt with a fire which left 13 people dead but the department had refused to make the report available to their families.

- David Lewis, executive director of Corruption Watch, said in May 2015 that immigrants from elsewhere on the continent were subject to repeated demands for bribes at border posts and by officials of the Department of Home Affairs. Those who set up small businesses soon encountered metropolitan police who rewarded them with “a broken skull and a trashed street stall” if they tried to assert their rights.

- A report in July 2015 by Lawyers for Human Rights and the African Centre for Migration and Society said that almost a third of the people who had to deal with South Africa’s refugee reception offices had been asked for bribes.

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- In July 2011 the deputy minister of co-operative governance and traditional affairs, Yunus Carrim, said that senior managers in municipalities often refused to act on certain key instructions from mayors or senior councillors on the grounds that “the party” which had “deployed” them had not agreed.

- In February 2011 Johann Mettler, who had been appointed by the KwaZulu–Natal provincial government to intervene in the maladministration of the Msunduzi (Pietermaritzburg) municipality, said that he had been shocked at the extent of lawlessness, non-compliance, and corruption. He said that “everyone from top to bottom had a sense of entitlement, were not answerable to anyone, and could do what they pleased”.

- The Human Rights Commission reported in 2010 that 93% of local authorities failed to comply with the reporting requirements of the Promotion of Access to Information Act of 2000. Only 44% of national departments complied with their reporting requirements.

- A confidential report by the auditor general in 2010 found that at least 58 arms transactions with clients in at least 26 countries had taken place in the year ending March 2008 without the legally required input by relevant government departments. The report said that the law required each transaction to be approved by a special committee of cabinet ministers, but that this had not been done. Nor had the relevant reports been made to Parliament since 2006.

- A high court judge ruled in January 2010 that the policy of the Department of Correctional Services of keeping prisoners in jail after they qualified for parole was illegal. Ordering the release of a man who had been imprisoned for murder, the judge said there had been a “complete and utter disregard” by prison officials and the state attorney for legal procedures, the rights of prisoners, and the authority of the court.

*In April 2012 an SABC journalist, Tim Ncube, was killed in a head-on collision when the motorcade transporting the Zulu monarch, Goodwill Zwelithini, overtook in the oncoming traffic lane. Also killed was the king’s VIP driver, Thembinkosi Mpanza.*

- A Pretoria motorist was told in July 2015 by the Tshwane Metropolitan Police Department that he could not renew his motor vehicle licence because a warrant had been issued for his arrest for “underpaid e-toll infringements”. The South African National Roads Agency, which is responsible for collecting e-tolls, said that this should not have happened.

- *BusinessDay* commented in an editorial in March 2015 that the president was often driven at very high speeds even on congested motorways, his own and other official drivers posing dangers to others. “It seems the privilege to ignore the rules of the road has become a perk of being in the executive, regardless of the consequences.”

- Incidents in earlier years include: the killing of cyclists by police vehicles; brain injuries to Thomas Ferreira, a teenager who was hit by the high-speed “blue light” vehicle transporting the Gauteng housing MEC, Humphrey Mmemezi, in 2011; motorists pushed off the road by oncoming “blue-light” vehicles; and assaults by bodyguards or drivers of official vehicles. In an editorial in January 2012, *The Citizen* complained that “official drivers get away with murder”.

- In July 2012 the Department of Justice and Constitutional Development said that the National Road Traffic Act of 1996 allowed for ministers’ drivers to exceed the speed limit. A number of ministers had replied to questions in Parliament indicating that they had been exempted from paying R207 740 in fines. The worst offender was the then mineral resources minister, Susan Shabangu, with R64 060 in fines. Also high on the list was the minister of agriculture, forestry, and fisheries, Tina Joemat-Petterson, with R30 400. Her department said that the fines were sent to the police, as she was only a passenger. Other departments said they had paid the fines or held drivers responsible.

- In April 2012 an SABC journalist, Tim Ncube, was killed in a head-on collision when the motorcade transporting the Zulu monarch, Goodwill Zwelithini, overtook in the oncoming traffic lane. Also killed was the king’s VIP driver, Thembinkosi Mpanza.

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- The South African Vehicle Renting and Leasing Association reported in November 2010 that the Johannesburg and Cape Town metropolitan traffic police were unlawfully locking motorists up for unpaid fines. The transport minister, Sbu Ndebele, said that “drivers arrested for any offence must have their driving licences seized as well as suspended and/or cancelled.” His spokesman, however, pointed out that licences could be removed only by court order.

- The minister of international relations and co-operation, Maite Nkoana-Mashabane, refused to comply with security procedures at the airport in Oslo (Norway) in September 2011. She declined to allow her handbag to pass through an x-ray scanner and then missed her flight, chartering a private aircraft instead at a cost of more than R235 000. The Norwegian airport authorities said that even the country’s prime minister had to go through airport checks; only royalty and heads of state were exempt.

- President Jacob Zuma refused to account for being six months late in 2010 with his report on his interests, assets, and liabilities as stipulated by the Executive Ethics Act of 1998.

### **Power/licensing/regulator abuses/over-reach**

- The shadow minister of economic development in the Democratic Alliance, Michael Cardo, said in April 2016 that the minister of economic development, Ebrahim Patel, was usurping the power of competition regulators in the proposed merger of SABMiller and Anheuser-Busch InBev by prosecuting his own policy agenda on the pretext of “development” and “public interest”. Effective regulation required clear and predictable institutional rules and administrative processes, Dr Cardo said, but Mr Patel was “riding roughshod over them”. *BusinessDay* wrote in an editorial in May 2015 that some of Mr Patel’s interventions were hard to justify in terms of competition issues. The retail sector was intensely competitive, so the minister’s zeal for yet another probe was “puzzling” and “baffling”. The paper said that it could only “speculate on the motives behind it”.

- Robert Vivian, professor of finance and insurance in the University of the Witwatersrand, wrote in April 2012 that the competition authorities were garnering billions of rands for the government without meeting the constitutional requirements of due process. This was because accused companies were persuaded to admit guilt and pay enormous fines, sometimes in excess of R1 billion. Instead of trial before an impartial judiciary adhering to historically established procedures, adjudication was “carried out in-house by the Competition Tribunal”, which was not part of the judiciary.

*Hulme Scholes, a mining lawyer, said in August 2015 that the Department of Mineral Resources (DMR) “abused the open-ended and vague provisions of mining charters to try and persuade mining companies to meet unwarranted demands”.*

- Patrick Bracher, senior partner in a law firm, wrote in August 2012 that the National Consumer Commission had lost several major hearings before the National Consumer Tribunal because it had acted beyond its powers, inter alia by issuing summonses when it was not entitled to do so. The summonses had been set aside, the tribunal pointing out that the commission was required to act lawfully and reasonably and in a procedurally fair manner. These were “serious indictments against a regulatory authority”, wrote Mr Bracher, since it was “not difficult to be a good regulator”. The tribunal, which is responsible for ensuring that the commission acts within the framework of the Consumer Protection Act of 2008, said that businesses had had to battle against illegal compliance notices, while the commission had also failed to meet its mandate of ensuring that consumers had effective recourse against infringements of the act.

- The chief executive of Telkom, Siphosiso Maseko, complained in August 2016 that the Independent Communications Authority of South Africa (Icasa) was “making rules on the run” on the spectrum licensing process. There were billions of rand at stake. “If rules are not clear but random and erratic, it creates discomfort.” Behaviour like this meant that almost all the big decisions ended up in court.

- Hulme Scholes, a mining lawyer, said in August 2015 that the Department of Mineral Resources

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(DMR) “abused the open-ended and vague provisions of mining charters to try and persuade mining companies to meet unwarranted demands”. Victimisation of mining companies often took the form of the department’s “instructing its mine health and safety inspectors to issue spurious notices” to suspend operations “as retribution”, Mr Scholes said in an affidavit.

- Several times in the past few years mining companies have suggested that the DMR has ordered shutdowns of entire mines when safety issues could be addressed without stopping operations. One mining executive said in 2015 that if stoppages, issued under Section 54 of the Mine Health and Safety Act of 1996, were challenged, “you get bullied, audited, and stopped to death”. The Chamber of Mines said it supported the justified application of stoppage notices, but that in some cases they were applied inconsistently and unfairly, and often involved the shutting down of unaffected areas. AngloGold Ashanti complained in August 2016 that only six of the 77 stoppage notices issued to it in the first half of the year related to fatal accidents, the rest being the result of audits and inspections and on technicalities. The DMR said it did not issue stoppage notices to victimise mining companies, but as a corrective measure to protect the lives of mineworkers.

*In October 2016 Kumba Iron Ore finally won an eight-year battle for a mining right which it had been unlawfully denied in 2009 in an abuse of the “first-in first-assessed” principle supposedly governing the granting of mining rights.*

- The North Gauteng High Court in February 2012 criticised officials of the mining inspectorate for grossly abusing their powers by closing down a brick manufacturer because of a worn tyre on a forklift, causing the company to lose more than R1 million. The judge, Brian Southwood, granted an order that the brickworks were not a mine. One official had dismissed a previous court ruling to this effect as “the mere opinion of a judge”.

- In October 2016 Kumba Iron Ore finally won an eight-year battle for a mining right which it had been unlawfully denied in 2009 in an abuse of the “first-in first-assessed” principle supposedly governing the granting of mining rights. A prospecting right had been unlawfully awarded to Imperial Crown Trading, a company linked to the Gupta family. This necessitated challenges by Kumba through the courts which eventually ended with a ruling by the Constitutional Court in its favour in 2013 – although it took the DMR three years to give effect to the court’s decision.

- In a recent survey of mining jurisdictions, the Fraser Institute reported mining executives as having said of South Africa that “the entire process of the administration of, and applying for, and awarding of, exploration rights is protected, corrupt, arbitrary, inconsistent, and a nightmare.

- In March 2014 the Mpumalanga department of public works abandoned its plan to evict 13 business owners who had operated in the historic gold-mining town of Pilgrims’ Rest for decades. The owners had been issued with summary eviction notices in 2012 and had been told the leases over their shops had been transferred to new tenants. A high court judge described the department’s tender process as a “shambolic” and halted the evictions pending a review. The proposed evictions were abandoned after the public protector had reported that “the process was characterised by gross irregularities and maladministration”.

- In January 2013 the Department of Social Development unlawfully cancelled the registrations of some 37 000 non-governmental organisations (NGOs). Following an outcry the registrations were reinstated, although it was not clear whether deregistration was a bona fide mistake or designed to intimidate NGOs, some of which have incurred the government’s wrath by criticising it or taking it to court.

- The Constitutional Court in July 2013 ruled in favour of two Free State high schools that had been forced by provincial education officials to readmit two pupils who had fallen pregnant and whom they had excluded. The court ruled that the officials had not followed required procedures in ordering the readmissions. It said that state functionaries, no matter how well-intentioned, could do only what the law em-



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powered them to do. The court also ordered the schools to review their pregnancy policies as there were concerns about their constitutionality. The SCA had ruled the previous year that departmental officials could not simply override the policies of school governing bodies.

- In 2012 the Free State High Court invalidated a decision by the minister of higher education, Blade Nzimande, to fire the vice chancellor of the Central University of Technology and replace him with an administrator. Judge Johann Daffue said the minister had exceeded his powers by these “drastic” actions and that he had to accept the autonomy of universities. Dr Nzimande said that the judgement risked making universities laws unto themselves and warned that he might amend the legislation to give himself powers to intervene when university administrations collapsed, a warning which he has subsequently implemented.

*In 2012 the Free State High Court invalidated a decision by the minister of higher education, Blade Nzimande, to fire the vice chancellor of the Central University of Technology and replace him with an administrator*

- The minister of police, Nkosinathi Nhleko, confirmed that he summoned the riot police to Parliament in August 2014 to deal with disruptions by the Economic Freedom Fighters without consulting the speaker, despite the fact that parliamentary legislation states that no members of a security service may enter the parliamentary precinct to perform any policing function without her permission.

- The minister of defence and military veterans, Nosiviwe Mapisa-Nqakula, was reported to have declared that she had provided passage in a state aircraft for a fugitive from Burundi who used forged papers, apparently provided by the minister’s sister, to enter South Africa illegally in January 2014. She said that in order to give the apparently abused fugitive “education and love” she would do the same again if necessary (see below).

#### **Bending the rules/selective enforcement/dilatory conduct/payment failure/impunity**

- A columnist on *Business Day*, Bronwyn Nortje, questioned selective enforcement of the Medical Schemes Act of 1998 by the Council for Medical Schemes. Private schemes were forced to bring their solvency reserves up to the statutory minimum of 25%, but the Government Employees Medical Scheme (GEMS) had been allowed to remain “stubbornly below” the statutory minimum for almost a decade. Ms Nortje suggested in August 2016 that the reason was that GEMS had the treasury as a backstop “when things go awry”.

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- The state-owned arms procurement company, Denel, sought permission in September 2016 to be exempt from treasury laws and regulations governing irregular expenditure that it had previously ignored.

- In May 2016 the Financial Intelligence Centre (FIC) handed a report to the commissioner of the South African Revenue Service (SARS), Tom Moyane, to the effect that his second-in-command, Jonas Makwakwa, should be investigated in connection with R1.2 million worth of “suspicious and unusual” deposits into his bank account. The report said that the payments should be probed to ascertain whether they were the proceeds of corrupt activities or other crimes. Mr Moyane said that he had given the report to Mr Makwakwa. However, it was not until the unusual bank deposits had been reported in the media and questions had been asked in Parliament in mid-September that Mr Makwakwa was suspended from his post. The FIC is a statutory body set up in 2003 to combat money laundering, the financing of terrorist activities, and other crimes. *BusinessDay* wondered in an editorial why the Hawks had not acted, contrasting the dilatory handling of the Makwakwa case with the swift actions against Pravin Gordhan. It also pointed out that Mr Moyane had also been quick to suspend other officials in connection with the supposedly unlawful “rogue

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unit” set up while Mr Gordhan was at SARS before his appointment as minister of finance. David Lewis, executive director of Corruption Watch, said that Mr Moyane was himself possibly guilty of an offence under the Prevention and Combating of Corrupt Activities Act of 2004 for not swiftly reporting Mr Makwakwa to the police.

- In September 2016 the *Mail and Guardian* contrasted the Hawks’ “dogged hounding” of Mr Gordhan with the fact that it had assigned only a single policeman to investigate allegations of “a complex multibillion rand fraud and corruption scandal” at the Passenger Rail Agency of South Africa.

- The chairman of the agency, Popo Molefe, expressed concern that political pressure was being brought to bear on the investigation, to which he and the treasury had assigned a large team of lawyers, forensic auditors, and information technology specialists to scrutinise documents relating to 142 tenders said to be “dodgy” with a contract value of some R24 billion. The newspaper said that some of the officials at the agency were refusing to cooperate with the investigation.

*In October 2016 the Free Market Foundation (FMF) contrasted the “extraordinary” efforts of the Hawks in investigating Pravin Gordhan with their failure to investigate the illegal use of an aircraft by the defence minister in January 2014.*

- In October 2016 the Free Market Foundation (FMF) contrasted the “extraordinary” efforts of the Hawks in investigating Pravin Gordhan with their failure to investigate the illegal use of an aircraft by the defence minister in January 2014. The FMF also queried the failure of the Hawks to investigate the unlawful sale of the country’s strategic oil stockpile (see below).

- Phephelaphi Dube, director of the Centre for Constitutional Rights, suggested that the failure of the National Prosecuting Authority to launch an investigation into some of the R6.8 billion worth of financial transactions of the Gupta family leading to the closure of their bank accounts (see below) might be a case of “selective prosecution”.

- Parliament’s standing committee on public accounts (Scopa) was severely critical of the work of a special anti-corruption task team co-chaired by the head of the Hawks, General Ntlemeza, when he appeared before it in September 2016. Members of Parliament complained that the task team had tackled cases to the value of only R10 billion since its inception in 2010, while the quantum of irregular, wasteful, and fruitless expenditure identified over that period by the auditor general was estimated at R150 billion. The committee was reportedly shocked to learn that there had been few convictions under the Public Finance Management Act, suggesting that only lower-level offenders were being prosecuted rather than accounting officers.

- In June 2015 Pravin Gordhan, then minister of co-operative governance and traditional affairs, said of irregular awards of tenders by municipalities that lack of punishment for wrongdoers was a major concern.

- In September 2015 Bernard Agulhas, chief executive of the Independent Regulatory Board for Auditors, said that auditors were doing an excellent job of reporting white-collar crime, which was escalating, but that the authorities did not do anything about it. His board could act against auditors who failed to report irregularities, but there was nothing it could do if the police failed to respond. One large audit firm, Deloitte, said that the rise in fraud, corruption, and money-laundering was having a “devastating” effect on the South African economy.

- In August 2015 Shaun Abrahams, who had been appointed a few months earlier as the new national director of public prosecutions, announced the withdrawal of perjury and fraud charges against Nomgcobo Jiba, who later became a deputy national director in the National Prosecuting Authority. Mr Abrahams succeeded Mr Mxolisi Nxasana, who resigned after less than a year in office after receiving a “settlement” of R17.3 million from the state.

- In September 2016 Johan Burger of the Institute for Strategic Studies said that many police officials

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had been disciplined and dismissed for lesser incidents of misconduct and with far less evidence available than was the case with the head of the crime intelligence division of the police, General Richard Mdluli, who had merely been suspended on full pay since 2012 while facing criminal prosecution.

- In April 2012 the acting national police commissioner, Lieutenant-General Nhlanhla Mkhwanazi, told Parliament that “high-ups” tell the police whom to investigate and whom not.

- After the police failed to act, the High Court in October 2015 granted Anglo American an urgent order for the eviction of people who had unlawfully invaded its land around a coal mine west of Emalahleni (Mpumalanga), land which the company said was uninhabitable.

*In April 2012 the acting national police commissioner, Lieutenant-General Nhlanhla Mkhwanazi, told Parliament that “high-ups” tell the police whom to investigate and whom not.*

- In a report published in December 2014 the public protector found that the Johannesburg City Council had failed to take action against an ANC councillor who had encouraged the illegal occupation of a building in the city, with the result that the lawful owners, who had wished to establish a shoe factory there, were ruined. The council had failed to disconnect the electricity of the illegal occupants, but instead sent the bills to the lawful owners, who could not sell the building without paying them. “Hijacking of buildings has become a major nightmare for investors,” the public protector said.

- Following pressure from the police, a farmer on the KwaZulu-Natal south coast withdrew charges against a suspected cable thief in 2010. The farmer had caught the thief and taken him to the police station. However the station commander then persuaded him to drop the charges as the local ANC ward councillor had said the community was not happy and that all whites would be chased away or killed. The community also threatened to testify that the farmer had assaulted the suspect before taking him to the police station. The ANC councillor was himself later arrested for being in possession of counterfeit money.

- The then justice minister, Jeff Radebe, said in Parliament in March 2010 in answer to a question, that the provinces had spent R237 million on legal fees for state attorneys in the preceding 11 months defending cases where provincial governments were sued for failing to pay bills. There had been 106 cases where provinces were sued for non-payment after courts ordered them to pay. Only the Western Cape was not sued. The worst province was the Eastern Cape and the worst defaulter there the health department. Those resorting to the courts to seek redress varied from hotels and resorts to optical companies, security companies, banks, investment houses, construction companies, and private individuals.

*+ In July 2012 a construction company, Sanyati Holdings, was forced into business rescue after non-payment of contracts by departments in three provinces, the Free State, Limpopo, and KwaZulu-Natal. The company, employing 2 500 staff, said that “any bank will tell you their client base is littered with this kind of problem – because the government has not paid timeously.”*

- In August 2015 the SCA criticised the “unbridled bureaucratic arrogance” of a Free State MEC who had refused to pay a contractor for work done on the grounds that the province had “failed to budget for the project”. Judge Eric Leach asked who would invest in South Africa if the government reneged on its contracts and then took legal points in the hope of persuading the courts to support its non-payment.

- In July 2012 a construction company, Sanyati Holdings, was forced into business rescue after non-payment of contracts by departments in three provinces, the Free State, Limpopo, and KwaZulu-Natal. The company, employing 2 500 staff, said that “any bank will tell you their client base is littered with this kind of problem – because the government has not paid timeously.” He denied allegations by the provinces that

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contractors' work was shoddy, and said that corruption in provincial departments was the main problem. Companies trying to get paid were confronted with "deceit, heavy-handedness, broken promises, and stringing you along".

- In June 2015 Clive Derby-Lewis, who was serving a life sentence for his role in the murder in 1993 of Chris Hani, secretary general of the South African Communist Party, was released on medical parole on orders of the North Gauteng High Court. Selby Baqwa ordered that Mr Derby-Lewis, who was suffering from terminal cancer, had the right to die with dignity as stipulated in the Constitution. In setting aside the decision earlier in the year by the minister of justice and correctional services not to release him despite the recommendation of the Medical Parole Advisory Board, Judge Baqwa said the process followed was flawed and procedurally unfair. This was the fifth time Mr Derby-Lewis had approached the courts with a parole application. The first was in 2007, but although the local parole board had recommended that he be released the following year, the minister declined to release him. This was despite the fact that he had served the required minimum of 15 years of his sentence. His attorney, Marius Coertze, blamed "political vindictiveness".

*In October 2016 the deputy minister of international relations, Luwellyn Landers, asked Parliament to take action against his department for having appointed a convicted drug trafficker, Hazel Francis Ngubeni, as South African high commissioner to Singapore.*

- Although the government was determined to keep Mr Derby-Lewis in prison until Judge Baqwa came to his rescue, a former national commissioner of police, Jackie Selebi, was released on medical parole in 2012 after having been sentenced two years previously to 15 years' imprisonment for corruption. Schabir Shaik, a close associate of Jacob Zuma, was released on medical parole in 2009 after serving only two years and four months of a 15-year sentence for fraud and corruption. The judge, Hilary Squires, made it clear that there was overwhelming evidence of a corrupt relationship between Mr Shaik and Mr Zuma, following which President Mbeki dismissed Mr Zuma from the deputy presidency in 2005.

- In July 2016, the North Gauteng High Court ordered the release on parole of Janusz Walus, who had been convicted of murdering Mr Hani. He had been entitled to parole eight years previously and the local parole board had recommended it in 2013. The judge, Nicolene Janse van Nieuwenhuizen, asked why the state wasted money and time going through parole processes if the fact that Mr Walus had murdered Mr Hani would always count against him. She denied the minister leave to appeal against her order, but he then successfully petitioned the Supreme Court of Appeal for leave, with the result that Mr Walus remained in prison. Julian Knight, Mr Walus's attorney, said that many other convicted prisoners who had committed murders had been released on parole much earlier than the applicant. He said the minister appeared to be bowing to political pressure to keep his client in jail as long as possible.

- The Wits Justice Project said in September 2016 that prisoners were sometimes denied parole because of their refusal to admit guilt in crime. However, the project said, refusal to admit guilt was not a condition of parole in law although it had become one in practice.

- In September 2016 James Lorimer, shadow minister of mineral resources in the Democratic Alliance, reported allegations of "top-level official involvement" in illegal gold mining in the area between Langlaagte and Roodepoort, west of Johannesburg. This, he suggested, helped explain why there was "suspiciously little official action to prevent illegal gold mining".

### **Illegal appointment/dismissal/suspension/failure to appoint/promote**

- The Democratic Alliance claimed in October 2016 that Dudu Myeni had been unlawfully appointed for an additional term as chairman of the uMhlatuze Water Board. Ms Myeni is also chairman of South African Airways and of the Jacob G Zuma Foundation.

- In October 2016 the deputy minister of international relations, Luwellyn Landers, asked Parliament to

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take action against his department for having appointed a convicted drug trafficker, Hazel Francis Ngubeni, as South African high commissioner to Singapore. Ms Ngubeni is the daughter of a former operative of Umkhonto we Sizwe, but it is not clear whether or not her conviction and two-year prison sentence in the US, which were reported in South Africa, were taken into account at the time of her appointment.

*In September 2016 the SCA denied the SABC's chief operating officer, Hlaudi Motsoeneng, leave to appeal against a high court judgement that his appointment had been "irrational and unlawful". The SABC board reacted to the SCA's judgement by appointing Mr Motsoeneng as group executive responsible for corporate affairs.*

- The Constitutional Court ruled in September 2016 that the minister of police, Nathi Nhleko, did not have the legal power to suspend Robert McBride, head of the Independent Police Investigative Directorate. Mr McBride had been suspended in March 2015 on allegations (which he denied) that he had doctored a report on unlawful renditions of Zimbabwean nationals. He claimed that the reason for his suspension was his political independence and willingness to combat crimes within the police force. The court said the minister's powers were "invasive" and that his unilateral action destroyed the confidence the public should have that IPID would be able investigate complaints against the police fearlessly and without favour or bias. Following the judgement against him, the minister asked Parliament to initiate proceedings against Mr McBride. As noted above, however, the deadline for doing so lapsed and Mr McBride returned to work.

- Zahhele Mbhele, shadow minister of police in the Democratic Alliance, said that Mr McBride's return was a "victory for constitution and the rule of law" against a minister who had "fallen foul of the law so many times". Mr Nhleko had succeeded in capturing the Hawks, but Mr McBride's return to duty would make it more difficult for him to capture IPID.

- In September 2016 the minister of police wrote to the speaker of the National Assembly asking that Parliament condone his failure to inform it of his appointment of General Ntlemeza as head of the Hawks. Although Parliament's approval of the appointment is not required, the minister was obliged to inform it within 14 days. He failed to do so for nearly a year. General Ntlemeza was appointed after the minister had dismissed his predecessor, Lieutenant-General Anwa Dramat, in 2015. Mr Dramat was dismissed for his supposed unlawful rendition of Zimbabwean fugitives, but he himself claimed the dismissal was because he had been conducting high-level investigations involving state tenders.

- In a case arising from the Dramat dismissal, a judge of the North Gauteng High Court, Elias Matojane, described General Ntlemeza as "biased and dishonest" and lacking "integrity and honour". He had also made "false statements under oath".

- It was reported in September 2016 that a regional court president in KwaZulu-Natal was still serving in that position a year after a complaint had been lodged against him for taking cash and sexual favours in exchange for giving a magistrate a job.

- In September 2016 the SCA denied the SABC's chief operating officer, Hlaudi Motsoeneng, leave to appeal against a high court judgement that his appointment had been "irrational and unlawful". The judgement followed a finding by the public protector that Mr Motsoeneng had lied about his qualifications, abused power by increasing his salary three times in the year, made unlawful appointments, and purged senior staff. The minister of communications, Faith Muthambi, had appointed him as permanent chief operating officer despite the public protector's findings. The SABC board reacted to the SCA's judgement by appointing Mr Motsoeneng as group executive responsible for corporate affairs. But the Cabinet said this bordered on "violating the constitutional principle of legality and challenged the constitutionally-assigned judicial authority of our courts". Ms Muthambi was directed to take "urgent steps" to address the state of affairs at the SABC, but she has failed to do this and Mr Motsoeneng was still in office at the time of writing.



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- The Labour Appeal Court reserved judgement in September 2016 on an appeal by the labour minister, Mildred Oliphant, against an order by the Labour Court last year that she reinstate a senior official whom she had unlawfully removed. The judges expressed concern about her political interference in objecting to the official's action against a trade union with some of whose leaders she was believed to have links.

- In September 2016 the Commission for Conciliation Mediation and Arbitration (CCMA) found that the Department of Correctional Services had unlawfully discriminated against a white man passed over for a vacant director's position in the North West province on the grounds that whites were over-represented at that level. The CCMA said that refusing to shortlist someone based on race or gender placed an absolute barrier on their opportunities for involvement in the workplace, which was prohibited by the Employment Equity Act of 1998.

- In July 2016 the Constitutional Court ordered the Department of Correctional Services in the Western Cape to promote and retroactively remunerate seven coloured employees who had been unlawfully denied promotion on racial grounds. The case, dating back to 2012, was brought on their behalf by the Solidarity trade union, which said that the department's use of national rather than regional racial demographics was unlawful. Solidarity said its members consistently faced unfair discrimination based on the use of national demographics in employment equity planning. This, it argued, inevitably led to plans that amounted to quotas, in contradiction of the Employment Equity Act.

*A Cape Town attorney reported in July 2015 that it was now common practice for state-owned companies to dismiss employees and executives prematurely, but then pay them off for their silence and to ensure that they did not challenge dismissal in court.*

- In January 2016 the Labour Court held that the previous equity plan of the South African Police Service was inconsistent with the Employment Equity Act and the Constitution and granted Solidarity an interdict suspending the filling of 3 000 advertised posts on the grounds that its 2015–2019 plan was not sufficiently flexible and therefore amounted to a quota system. Quotas are more rigid than goals or targets, and are therefore unlawful. Following the correctional services case referred to above, Solidarity and the police reached an agreement that the employment equity plan would be amended. In addition, more than 30 individual affirmative action cases being brought by Solidarity would be investigated.

- In April 2016 the Labour Court ordered the Tshwane metropolitan municipality to promote a white man to a foreman's job from which he had been excluded on racial grounds. The court said that redress as set out in the Employment Equity Act was not meant to function as a quota system, and that therefore there could be no absolute barrier to people not from designated groups.

- The Eastern Cape High Court ordered the Amathole district municipality in 2008 to appoint as municipal manager a person whom it had previously denied the appointment after "succumbing to a political directive" from an external body, the ANC's regional executive committee. The committee had disregarded "the merits of the matter" despite the fact that the municipality's recruitment policy required that appointments be fair and based on merit.

- A Cape Town attorney reported in July 2015 that it was now common practice for state-owned companies to dismiss employees and executives prematurely, but then pay them off for their silence and to ensure that they did not challenge dismissal in court. The taxpayer carried the costs of these "dodgy" dismissals, and the individuals in question were never prosecuted for possible criminal offences.

- In a case in 2013 involving the unlawful dismissal of a gambling board by an MEC, the SCA said she had a duty not to frustrate the enforcement by the courts of constitutional rights and that the state should indeed be a "model of compliance". It was time, the SCA said, for courts to seriously consider holding high-handed officials such as the MEC to account and make them personally liable for costs incurred.

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- Police officials revealed in answer to a parliamentary question in 2013 that 306 police officers had been appointed subsequent to conviction for crimes including murder, rape, housebreaking, and drug trafficking .

- A police officer in Gauteng, Janet Basson, was promoted from brigadier to major general in May 2016 despite the fact that charges of perjury, fraud, and defeating the ends of justice had been opened against her the previous month. Ms Basson said that the allegations against her were ridiculous.

- In 2010 a senior naval officer was restored to a senior position as a reservist in the South African National Defence Force (SANDF) after having resigned in 2008 upon conviction by military court for fraud and assault. SANDF regulations stipulate that nobody with a criminal record may enrol as a reservist.

- In October 2012 the Constitutional Court set aside the appointment of Menzi Simelane as national director of public prosecutions on the grounds that the appointment had been made despite findings questioning his integrity and was therefore irrational. Ms Jiba was then appointed as acting national director even though her fitness for that office was open to question. Mr Nxasana was then appointed but soon elbowed out in June 2015 and Mr Abrahams was put in. In October 2016 Mr Nxasana said that he suspected he had been removed and replaced by a “lackey” because Mr Zuma’s insiders feared he would reinstate the charges against the president.

### **Irregular/wasteful expenditure/sales/misappropriation/procurement**

- The chairman of the Central Energy Fund was dismissed in September 2016 by the minister of energy for his role in an abortive attempt by the Strategic Fuel Fund to acquire the South African assets of the American oil company Chevron. The minister claimed that her instructions that the state would not participate in the transaction had been treated with “contempt”. In May 2016 the minister, Tina Joemat-Petterson, authorised the sale of South Africa’s strategic stockpile of 10 million barrels of oil in a closed tender even though the necessary authorisation of the minister of finance had not been obtained. The auditor general subsequently found the deal to have been illegal. He also said that the minister’s claim that the oil had been sold for R5 billion was erroneous, as the actual amount received was R3.9 billion. The sale took place at a price of \$28 a barrel when the market price of oil was between \$37 and \$44. The loss to the state (as owner of the oil) was estimated at between \$1.5 billion and \$2 billion.

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- The treasury said in April 2016 that a proposed joint venture between Denel and VR Laser Asia, a Gupta-associated company, was not legal as Denel had not received the permission of the finance minister to proceed with the transaction, such permission being a requirement of the Public Finance Management Act.

- Referring to state-owned enterprises, the minister of finance, Pravin Gordhan, said after delivering his budget speech in February 2016 that these had been “captured” to the extent that control mechanisms had been lost. “Those driving a particular deal had virtually no resistance, no accountability, no transparency, and no oversight over what actually happens, and it is a potential disaster”.

- Mmusi Maimane, leader of the Democratic Alliance (DA), claimed that his party had “uncovered a truly staggering display of waste and corruption” in the city councils it took over after the municipal election on 3rd August 2016. Most were being used “as bloated employment agencies for ANC cronies”.

- Eugene Zungu, a senior official in the auditor general’s office, said in October 2016 that, despite strong legislation and regulations, many people got away with misconduct in the public sector because the penalties were not enforced. Lack of consequences meant that there was widespread looting as well as

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irregular and wasteful expenditure in various government departments

- The auditor general, Kimi Makwetu, reported in June 2015 that R781 million worth of tenders had been awarded in 2013/14 to close family members of employees and councillors of municipalities. Mr Makwetu said that 99% of the total R11.3 billion in irregular expenditure was the result of “non-compliance’ with tender rules.

- The accountant general, Freeman Nomvalo, said in February 2013 that irregular expenditure by government departments had doubled each year for the past three years. People with political or administrative authority were “getting more and more disrespectful of their own legislation”. This opened opportunities for looting and for “tender-rigging to become the order of the day”. Corruption, Mr Nomvalo said, “happens because the pressure comes from the top – it comes from the political authorities.”

*The accountant general, Freeman Nomvalo, said in February 2013 that irregular expenditure by government departments had doubled each year for the past three years. This opened opportunities for looting and “tender-rigging”.*

- The director general of higher education said in September 2016 that the National Skills Fund had been approached to make funds available for technical and vocational colleges that were under financial stress. The fund is financed by a skills development levy collected as a payroll tax and is paid to the country’s 21 sector education and training authorities (Setas). Ivor Blumenthal, a former chairman of one such authority, said in June 2016 that the Department of Higher Education and Training was involved in “levy capture” to divert the funds from employers using them for skills training to universities and to the colleges.

- In 2011 the department decided to appeal against a ruling by the High Court that the minister of higher education, Blade Nzimande, had acted unlawfully in suspending Dr Blumenthal as chief executive of the Services Seta and appointing two other people to its board, one of them the wife of the secretary general of the ANC, Gwede Mantashe. According to an editorial in *BusinessDay* in May 2011, the department appeared to be “in the process of removing huge sums of money from the [Services] Seta’s account”.

- The public protector said in July 2011 that leases of office accommodation for the police in Pretoria and Durban were “unlawful” and “improper” as they were in breach of the Constitution, the Public Finance Management Act, and treasury regulations. However, there was insufficient evidence to establish criminality. The unlawful leases included R500 million for a new police headquarters. Several officials who had tried to halt the unlawful deals were suspended. Geoff Doidge, the minister of public works, was fired. The deals had been signed with Roux Shabangu, a businessman reported to be a friend of Mr Zuma.

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- Citing a 2014 report by the public protector, a paper published by the Helen Suzman Foundation in September 2016 said that generous “golden handshakes” paid by the SABC in respect of staff irregularly suspended, dismissed, or forced to resign amounted to “fruitless and wasteful expenditure”. The paper suggested that criminal prosecutions could be instituted against the board for failure to comply with the Public Finance Management Act.

- Francis Antonie, director of the foundation, which has been involved in several successful cases against the government, said that the government had often “foolishly engaged parties in fruitless legal battles that cost taxpayers millions”.

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- Ben Winks, an independent constitutional consultant, said in September 2016 that there were widespread examples of the government opposing valid lawsuits and that the state had a “hopeless record” in embarking on appeals. Mr Winks said the state attorney’s office would sometimes waste the state’s time and money in presenting cases without legal merit.

### **Unlawful action/behaviour/confiscation of goods/assets**

- Shortly after the fraud and theft charges against Mr Gordhan were announced in October 2016, he launched an application in the High Court in connection with 72 transactions in and out of bank accounts belonging to members of the Gupta family and their business associates. The transactions were said to be worth R6.8 billion. The application was designed to confirm that the Cabinet had no authority to intervene in decisions by the banks to close the Gupta accounts, despite the fact that a minister close to the Guptas, Mosebenzi Zwane, had been trying to get the Cabinet to intervene with the banks on their behalf.

- One of the suspicious transactions was the transfer of R1.3 billion from a mine rehabilitation trust fund to a Gupta company. Such funds are ring-fenced for rehabilitation purposes. Transfer would have required the permission of Mr Zwane as minister of mineral resources.

*In 2015 Siraj Desai of the Western Cape High Court found that a number of garnishee orders issued by magistrates’ courts were unlawful.*

- Despite having been informed by Mr Gordhan that it would not be lawful to intervene with the banks on behalf of the Guptas, Mr Zwane attempted to do so.

- In 2015 in an application brought by the University of Stellenbosch Legal Aid Clinic, Siraj Desai of the Western Cape High Court found that a number of garnishee orders issued by magistrates’ courts were unlawful. The orders purported to enable creditors to obtain repayment of moneys owed to them by compelling employers to make deductions from salaries. They had, however, been illegally given not by magistrates but by clerks of the court working in conjunction with unscrupulous credit providers, causing enormous hardship to indigent debtors. An executive of a debt management company said that many orders had been issued at “certain specific courts where corrupt clerks of the court were happy to issue [them] to micro-lenders or other creditors in return for bribes”. A company that audits payrolls for suspect garnishee orders said 40% to 50% were issued in wrong jurisdictions, making them illegal. Wendy Appelbaum, a businesswoman who helped to bring the case before Judge Desai, said many garnishee orders were obtained in courts far from where people lived and borrowed money, opening the whole system to abuse as lenders bribed clerks in small towns. In 2016 the Constitutional Court ordered that there had to be oversight by magistrates when an order was granted. George Devenish, a law professor, said that one of the effects of the Constitutional Court’s decision requiring judicial oversight was that creditors would now have to avoid lending recklessly as they might not be able to recover their debts so easily.

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- According to a report by the Socio-Economic Rights Institute of South Africa, officers of the Johannesburg metropolitan police had confiscated goods from some 7 000 Street traders between September and October 2013 in Operation Clean Sweep despite a constitutional court ruling that this was illegal and degrading. In October 2016 the institute announced that it had launched a damages claim against the city authorities on behalf of 1 652 informal traders for R120 million. It said that they had been unlawfully evicted from their places in the inner city during the operation. The evictions had taken place despite the court ruling and despite the fact that the traders had been given permits. Many had been assaulted and had their goods trashed, and all lost large quantities of stock.

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## Illegal deportation/rendition/entry refusal

- Hans Fabricius, the judge who ordered the arrest of Omar al-Bashir, said that immigration officials had previously ignored high court orders.

- An immigration officer at Cape Town airport refused to comply with an order by Dennis Davis of the Western Cape High Court in November 2011 to stop the deportation of a woman from Uzbekistan who had been refused entry into South Africa despite having a valid visa. The officials refused even to take a phone call from the judge to explain the implications of his order, and put the woman on the next Turkish Airlines flight out of the country. Judge Davies said that if court orders were ignored “our constitutional democracy will be destroyed in the final analysis”.

- In January 2010 three officials of the Department of Home Affairs arrested a family near Meyerton (Gauteng) and drove them through the night to a border post with Mozambique. The family was not permitted to take any belongings, not even a change of nappy for the 18-month-old baby, and their house and vehicle were left abandoned. According to the Displaced and Migrant Persons Support Programme, there had been “no warrant, no documentation, no procedures. Just load up one specific family at one in the morning and drive to the border.”

## Obstruction of justice/delay/interference/unlawful dropping of prosecutions

- In June 2016 it was revealed at a board of enquiry that the national police commissioner, Riah Phiyega, had issued police lawyers with instructions not to comply with certain requests of the commission of enquiry into the shootings at Marikana in August 2012, in which 34 people died. Ms Phiyega was suspended from office following a recommendation by the commission, headed by a retired judge, Ian Farlam, that her fitness to hold office be investigated.

*In September 2016 the deputy national director of public prosecutions, Nomgcobo Jiba, was struck off the roll of advocates by the North Gauteng High Court. Also struck off was one of her senior colleagues, Lawrence Mrwebi, head of the commercial crimes unit at the National Prosecuting Authority (NPA).*

- In September 2016 the deputy national director of public prosecutions, Nomgcobo Jiba, was struck off the roll of advocates by the North Gauteng High Court. Also struck off was one of her senior colleagues, Lawrence Mrwebi, head of the commercial crimes unit at the National Prosecuting Authority (NPA). The court’s decision was made following an application by the General Council of the Bar of South Africa that the two officials were not fit and proper persons to be members of the bar. The case arose from the efforts of the two to shield General Mdluli from prosecution by dropping the charges against him. The judge, Francis Legodi, said he could not believe that the two advocates as “officers of the court” could “stoop so low for the protection and defence of one individual implicated in serious crimes”. Both filed applications for leave to appeal against the judgement. In October 2016 President Zuma served notice of his intention to suspend them pending an enquiry into their fitness to hold office. (The charges against him having been reinstated by the North Gauteng High Court, General Mdluli is currently on trial for assault, intimidation, kidnapping, and defeating the ends of justice, among other things.)

- Ms Jiba has previously been severely criticised in the courts on several occasions, and is believed to have been part of the decision by the NPA in 2009 to drop the charges against Mr Zuma. She has also been accused of victimising a senior policeman, Major-General Johan Booysen, and other prosecution officials, among them Gerrie Nel and Glynnis Breytenbach. Mr Nel had successfully brought Jackie Selebi to book, while Ms Breytenbach had refused to drop charges against General Mdluli.

- In November 2012 the minister of agriculture, forestry, and fisheries, Tina Joemat-Petterson, said during a strike among farmworkers in the Western Cape that the government would ensure that no worker would face criminal or disciplinary charges for participation in the strike. “We will speak to the National



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Prosecuting Authority and the police minister to ensure that all cases of intimidation and public violence are withdrawn.”

- Since 2003, Mr Zuma has faced the possibility of prosecution for corruption arising from the arms deal first announced in 1999. The first national director of public prosecutions, Bulelani Ngcuka, said there was a prima facie case against him but that he would not be charged as the case was unwinnable. Mr Zuma's associate Schabir Shaik was in fact convicted in June 2005 of having made some R1,2 million in corrupt payments to him. Charges were then laid against Mr Zuma but these misfired and were not successfully reinstated until December 2008 on orders of the SCA. In April the following year, however, the acting national director of public prosecutions, Mokotedi Mpshe, decided not to proceed with the 18 charges, comprising 783 counts of fraud, corruption, and racketeering. His said his decision was based on improper behaviour of the prosecuting authorities and the police, as revealed in secret intelligence tapes (the “spy tapes”) supplied by Mr Zuma's lawyers. Shortly after this decision to drop the charges, Mr Zuma was elected president following the general election that same April of 2009.

- In the meantime attempts by the official opposition and others to obtain the spy tapes were repeatedly thwarted by Mr Zuma (who had obtained them unlawfully in the first place). However, they were eventually obtained. In April 2016, seven years after Mr Mpshe's decision to drop the charges against Mr Zuma, they were reinstated by the North Gauteng High Court on an application brought by the Democratic Alliance. The court said Mr Mpshe had found himself under pressure to discontinue the prosecution and that he had ignored his oath of office, which required him to act independently and without fear or favour. The prosecution was not tainted by the spy tapes, and the decision to drop it was irrational. The court accordingly set that decision aside and refused leave to appeal. Mr Zuma, it added, “should face the charges as set out in the indictment”.

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- The state then applied for leave to appeal against this judgement, but the Constitutional Court rejected the application on the grounds that it was “not in the interests of justice to hear the matter at this stage”. Mr Zuma separately applied to the Supreme Court of Appeal for leave to appeal against the judgement reinstating the charges. On 12th October that court ordered that the parties be prepared to argue the merits of the matter before it orally if called upon to do so. They were given three months to file the relevant papers.

- In February 2012 a high court judge, Kathy Satchwell, attacked the “gross incompetence” of the Department of Justice for a six-year delay in giving three prisoners documentation relating to judgements against them, so preventing them from lodging petitions for leave to appeal. She was “appalled” and “aggrieved” by the injustice and “disaster” inflicted on the men by the department, which was riddled with “mismanagement”. If the judgements were not handed in within six weeks, she told the three men, “I will release you”.

- In March 2012 the Wits Justice Project complained that 11 people charged with murder and armed robbery committed in 2007 had had their case postponed nearly 50 times in 166 court sessions.

### **Unlawful arrest/detention/banning/surveillance/treatment/escape**

- In October 2016 Melanie Dugmore of the African Policing Civilian Oversight Forum reported that the number of escapes from police custody had risen from 697 in 2014/2015 to 949 the following year. She said that there were 389 disciplinary cases against police officials in relation to escapes.

- According to a report tabled in Parliament in October 2016 by the Department of Justice and Cor-

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rectional Services, the government has spent almost R1 billion in legal fees in the past year defending itself against civil claims. The police have largely been sued for wrongful arrests and the Department of Health for negligence.

- In September 2016 a high court judge awarded an unemployed man R2.8 million in damages against the police and justice ministers after he had been unlawfully arrested and then detained in prison for 226 days, an experience which had traumatised him.
- Also in 2016, the minister of police told Parliament that the police had paid out more than R203 million for wrongful arrests in the 2015/16 financial year.

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- In August 2014 the North Gauteng High Court awarded R266 000 in damages to Mrs Gaye Derby-Lewis, wife of Clive Derby-Lewis, for unlawful arrest and detention and malicious prosecution for alleged possession of firearms and ammunition. She had been acquitted of all charges in 2003.
- The High Court in August 2010 ordered the release of Mzilikazi Wa Afrika, a journalist on the *Sunday Times*, on the grounds that detaining him one minute longer would not be in the interests of the rule of law. Even though the National Prosecuting Authority said there was no case against him, the Hawks refused to release him until the judge's order. The arrest followed a report written by Mr Wa Afrika about the alleged flouting of due tender procedures by the police commissioner, Bheki Cele. The newspaper's editor, Ray Hartley, said the incident had no serious purpose, amounted to "detention without trial", and was from the outset designed to intimidate. The paper called on Mr Zuma to instruct General Cele to halt his campaign of intimidation. Earlier in the year Tshepo Lesole, another journalist, was threatened by the police's VIP protection unit and forced to delete photographs he had taken of Mr Zuma's motorcade outside Baragwanath Hospital.
- Lawyers for Human Rights (LHR) said in 2010 that it had brought more than 60 urgent court applications in the past 18 months for immediate release of asylum seekers who should be held only in exceptional circumstances. The Department of Home Affairs had lost all but two of the cases. According to LHR, the department "repeatedly disregards the law, detaining people for months or even years without bringing them before a judge". It also opposed court applications of detainees at great personal cost to individuals as well as to taxpayers.

*In 2012 the Constitutional Court awarded R270 000 in damages to a Cape Town businessman, Dudley Lee, who had contracted tuberculosis (TB) in Pollsmoor prison outside Cape Town while awaiting trial.*

- In 2012 the Constitutional Court awarded R270 000 in damages to a Cape Town businessman, Dudley Lee, who had contracted tuberculosis (TB) in Pollsmoor prison outside Cape Town while awaiting trial. The court ruled that the Department of Correctional Services could be held responsible when inmates contracted TB because it had ignored its own regulations on screening, ventilation of cells, and other matters.
- After a visit to the prison in 2015, Edwin Cameron, a judge on that court, said that conditions considered in the Lee case were still unaddressed. There were very few windows and insufficient ventilation. Judge Cameron said that "the extent of overcrowding, unsanitary conditions, sickness, emaciated physical appearance of the detainees, and overall deplorable living conditions were profoundly disturbing." Among other things, his report found that there were persistent shortages of basic medical supplies, including TB medication. Little HIV testing occurred. Subsequently to his report, several prisoners died of leptospirosis,

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an infectious disease spread by rats. Conditions in the prison were said to be in clear violation both of the Bill of Rights and of the Correctional Services Act.

- In September 2014 Ronnie Kasrils, a former intelligence minister, said that he had discovered that various intelligence agents were working not for the state, but for ANC headquarters at Luthuli House.
- In 2014 the offices of a number of academics, as well as a trade union office, were broken into after accusations that they had been working to effect “regime change” and/or destabilise South Africa.
- In March 2014 the parliamentary joint standing committee on intelligence reported that thousands of South Africans had probably had their e-mails and telephone and cell phone calls unlawfully intercepted.
- In October 2011 the leader of the Democratic Alliance, Helen Zille, said that “government agents are abusing their power to spy on individuals without permission from a judge as required by law”.
- In October 2012 an attorney at Eversheds, a law firm, reported that there was a growing tendency of several municipalities in Gauteng to misinterpret legislation to “ban public gatherings altogether regardless of their purpose or nature”. To be protected by law, gatherings require adequate notice and they may not threaten disruption, injury, or damage. However, the attorneys said, gatherings were being prohibited without proper justification.
- In May 2014 Jane Duncan of the school of journalism and media studies at Rhodes University wrote that “unlawful” protests were on the increase because municipalities were “making it increasingly difficult to protest lawfully”. Prohibitions were nevertheless the exception rather than the rule and the vast majority of protests went off without incident.

### **Unlawful use of violence by police/prison warders**

- A study led by Professor Mohamed Seedat, director of a research unit of the Medical Research Council in partnership with the University of South Africa, said in May 2016 that most protesters in South Africa began their demonstrations peacefully, but that they encountered “a militarised police force instead of responsible leadership”, with the result that the presence of the police often provoked protesters, who responded by resorting to violence. A researcher at the Institute of Security Studies said that she had also come to the conclusion that the police were one of the main triggers associated with violent protests.
- In May 2015 the minister of police, Nkosinathi Nhleko, said that a police presence had been required at 14 740 incidents in the past year, and that 2 289 of the incidents had turned violent. The protests “continue to strain the resources of the police”, he added, noting that 86 police officers had lost their lives in the previous year, 35 of them on duty.

*In 2014/15 some 3 856 complaints of assault or torture were lodged with the Independent Police Investigating Directorate (IPID) against the police. In that same year there were 19 criminal convictions of police officers for torture and/or assault.*

- A report by the social change research unit at the University of Johannesburg in February 2014 said that 43 protesters had been killed by the police between 2004 and 2014. How many of these killings were lawful and how many not is not clear. In 2016 the unit said that there had been 67 750 protests in the preceding 17 years, 80% of them orderly, 10% disruptive (such as blockading roads), and 10% violent (with injuries or damage). Nearly half the protests were related to labour matters, while almost a quarter arose out of dissatisfaction with “service delivery” in particular communities.
- In 2014/15 altogether 396 people died as a result of police action. The single largest category of deaths (114) occurred during the course of arrest, while 106 occurred during the course of a crime. In the same year, there were 44 criminal convictions of policeman for killings, torture, assault and rape. Although years in which killings happen and those in which trials occur do not coincide, the figures suggest that about 10% of reported deaths at the hands of the police result in criminal convictions. How many of the killings by the police are unlawful is impossible to say.

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• In 2014/15 some 3 856 complaints of assault or torture were lodged with the Independent Police Investigating Directorate (IPID) against the police. In that same year there were 19 criminal convictions of police officers for torture and/or assault. Peter Jordi, a practising attorney attached to the Law Clinic at the University of the Witwatersrand (Wits), told a meeting at the IRR in 2012 that the police used torture on a massive scale. Carolyn Raphaely of the Wits Justice Project reported Professor Jordi as having said: “The police torture people all the time – in their homes, in police cells, in the veld, in cars... Torture is standard police investigation practice. These policemen are serial criminals. They have methods of investigation that are unlawful and for which they could be prosecuted but they never are. Police torture is a daily occurrence where I practise.”

*According to a report of the Institute of Security Studies in 2016, warders are inflicting torture on prisoners using electric shock devices in violation of international agreements prohibiting torture.*

• In 2011 and 2015 the IRR published two reports, themselves based on numerous press reports, showing that the police were involved in serious and violent crime, including murder, armed robbery, rape, burglary, theft, and torture on a substantial scale. The IRR reports also found that significant numbers of police officers remained in the employ of the police even when they had been convicted of serious crimes. The conclusion the IRR reached was that police criminality was not a case of “isolated incidents”, but a “pattern of criminal behaviour”.

• In the four years between 2011/12 and 2014/15, R1.73 billion was incurred by the police in legal costs, court orders in respect of civil claims, and settlements paid. How much of this was for unlawful behaviour is not clear.

• In April 2013 a spokesman for IPID, Moses Dlamini, said that the police’s disciplinary measures and punishments were laughable. He called for tougher internal censure of police officers found guilty of corruption, torture, and causing the death of suspects in their custody.

• A former minister of intelligence, Ronnie Kasrils, wrote in 2013 that he had long been concerned at reports of beatings and torture in police cells, attacks on protest demonstrations, police corruption, the use of conspiracy theories to deal with opponents of the government, and moves to strengthen the government’s “security cluster”. Mr Zuma, he said, should arrest this “descent into police state depravity” by dismissing his minister and commissioner of police.

• According to a report of the Institute of Security Studies in 2016, warders are inflicting torture on prisoners using electric shock devices in violation of international agreements prohibiting torture. Referring to increasing numbers of assaults in prisons, Lukas Muntingh of the Civil Society Prison Reform Initiative said in 2015 that a general culture of impunity exists” and that “it is a rare event that officials are prosecuted for assault and torture of prisoners, even where the result was fatal”. It added that the judicial inspectorate for correctional services had complained of the lack of prosecutions. The previous year Professor Muntingh said that of 4 203 complaints lodged with the inspectorate, only 133 disciplinary cases had been instituted against prison officials.

• In August 2012 police shot dead 34 miners during a strike at Lonmin’s platinum mine at Marikana in North West province. The shootings followed ten homicides during a violent strike, some of them of security officers and policemen, and others of mineworkers. Many people who viewed the police shootings on television described them as a massacre. Some of the victims were reported to have been executed by the police, who were also accused of tampering with evidence and planting weapons on the dead. It was further alleged that the shootings had been premeditated. The commission of enquiry under the chairmanship of Judge Farlam recommended a full investigation into possible criminal liability on the part of the police. However, at the time of writing, more than four years later, there had been no prosecutions of any police.

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- By contrast, 279 other miners were arrested on charges of the “planned and premeditated murder” of the 34, supposedly because they had made common cause with the police to bring about the fatal shootings of their colleagues. The decision triggered so much outrage that the charges were dropped. The IRR said that since there was no prospect of obtaining convictions, the charges “were an abuse of the criminal process”. However, at the time this report was being written, 16 mineworkers were facing trial for murders committed before and after the shootings.

- In April 2013 seven police officers were acquitted on charges of murdering Andries Tatane, who had been shot dead during a demonstration two years previously in Ficksburg in the Free State. Video footage showed that Mr Tatane, who was unarmed, had been brutally beaten while kneeling defenceless on the ground as well as shot. The Institute for Security Studies said the police had gone “completely overboard”. The court said that the violence used to stop Mr Tatane had been “disproportionate to his actions,” but that the state had failed to prove its case after two key police witnesses changed their testimony, possibly to protect the police.

- In November 2015 eight former policemen were sentenced to 15 years' imprisonment for murdering Mido Macia, a taxi driver from Mozambique, who had died in a cell in the Daveyton (East Rand) police station in February 2013 after he had been handcuffed to a police van and dragged through the streets. A high court judge, Bert Bam, described the murder as “barbaric” and said the community was entitled to protection against rogue policemen. He added that Mr Macia's arrest for a minor traffic violation was unlawful. The prosecutor said during the trial that he had been so badly assaulted that “there were no organs that were not damaged”.

- Commenting on the conviction for the murder of Mr Macia, David Bruce, an independent researcher specialising in crime and policing, said that legal consequences for police officers who used excessive force were the “exception to the general rule”. No one had been convicted for the killing of Mr Tatane, and no one even suspended for the killings at Marikana. “And these are just the high-profile cases.” The *Mail and Guardian* said in an editorial that “police brutality has become an entrenched reality” during the term of Nathi Mthethwa, who had been “instrumental” in Mr Zuma's assumption of power and was “an important member of [his] kitchen cabinet”. The newspaper said that attempts to combat the culture of brutality in the police force had come to little. Mr Mthethwa was minister of police from 2009 to 2014.

*Mido Macia, a taxi driver from Mozambique, died in a cell in the Daveyton (East Rand) police station in February 2013 after he had been handcuffed to a police van and dragged through the streets.*

- In April 2008 the deputy minister of police, Susan Shabangu, told a police gathering, “You must kill the bastards... I want no warning shots. You have one shot and it must be a kill shot... I will not tolerate any pathetic excuses for you not being able to deal with crime. You have been given guns, now use them.” Two days later her remarks received the backing of Mr Zuma as president of the ANC: “If you have a deputy minister saying the kinds of things that the deputy minister was saying, this is what we need to happen.”

#### **“State capture”/“rogue”state/corruption**

- In October 2016 Afriforum launched an Anti-Corruption Unit in conjunction with Paul O'Sullivan. Monique Taute, head of the new unit, said that the very institutions supposed to “protect us from crime have



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instead been infiltrated by criminals with badges who have decided to rather form partnerships with the underworld". The unit and Mr O' Sullivan then provided information on what they described as the corrupt dealings between Radovan Krejcir, a convicted criminal, and a magistrate and three police generals whom they named. One of the generals was Richard Mdluli. None of Mr Krejcir's crimes would have been possible, said Mr O'Sullivan, "without the assistance and protection of senior officials within the criminal justice system who, instead of locking him up, colluded with him to commit fraud, corruption, racketeering, robbery, and murder, and to defeat the ends of justice". He said he had opened multiple dockets containing volumes of evidence against the senior officials but that none of them had been brought to book. Instead he, O' Sullivan, had been attacked in the most unsettling of ways and with considerable state resources.

*In October 2016 Sipho Pityana, chairman of AngloGold Ashanti and a former director general of labour and of foreign affairs, described Mr Zuma as the "sponsor-in-chief of corruption" and called on him to resign.*

- Mr Krejcir, who had been sentenced in February 2016 to 35 years' imprisonment for attempted murder, kidnapping, and drug dealing, offered to turn state witness and give evidence against the officials with whom he had colluded in return for concurrent ten-year jail sentences in respect of additional offences to which he offered to plead guilty in a trial currently under way. The offer was made on 4th October to Andrew Chauke, director of public prosecutions for South Gauteng. The matter was also referred to the national director of public prosecutions, Shaun Abrahams, and to the deputy president, Cyril Ramaphosa.

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- The secretary general of the ANC, Gwede Mantashe, said in September 2016 that the organisation needed a candid debate on state capture to "save our movement". State capture, he said, was a system where leaders of a movement got business people to sponsor them in their campaigns in return for which they served as proxies for business interests. The state was also used to target certain individuals and political opponents for removal, creating a "mafia state". Following a meeting of the national executive committee of the ANC early in October Mr Mantashe said that the organisation would conduct "lifestyle audits" of political leaders and public servants to counter corruption.

- Kgalema Motlanthe, a former secretary general of the party (and later president of the country in the short interregnum between Thabo Mbeki and Jacob Zuma in 2008 and 2009), said in 2007 that corruption was far worse than anyone imagined. "This rot is across the board. It is not confined to any level or any area of the country. Almost every project is conceived because it offers opportunities for certain people to make money." Despite these remarks, Mr Motlanthe later fired Vusi Pikoli for instituting criminal charges against Jackie Selebi.

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- *BusinessDay* wrote in an editorial in May 2012 that "it is no exaggeration to say that there are entire towns, and critical state departments, that are now in the hands of organised crime syndicates masquerading as public servants. Their sole aim is to loot, and creating a climate of general administrative chaos is an excellent smokescreen."

- In August 2013 the executive director of Corruption Watch, David Lewis, said that many public sector

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institutions, from national departments to rural schools, had become sites of accumulation for powerful and well-organised syndicates.

- In April 2012 a leading journalist, Justice Malala, said that Jacob Zuma was “running what is now clearly a gangster state”. In August of that same year Reuel Khoza, chairman of Nedbank, said that corruption was “rife at the top of society.” In February 2016 Songezo Zibi, editor of *BusinessDay*, wrote that South Africa had become “effectively a gangster state”.

- The following month Mzukisi Qobo, associate professor at the Pan African Institute in the University of Pretoria, said that South Africa was gradually being transformed into a “mafia” state.

### Whitewashes

- The report in April 2016 of the commission of enquiry under Willie Seriti into the arms procurement deal worth almost R47 billion announced in 1999 was widely dismissed as a whitewash when it failed to find evidence of irregularity or corruption. Suspicions of wrongdoing in the arms deal surfaced almost as soon as the transaction became public knowledge some 17 years ago. As noted above, attempts by the parliamentary standing committee on public accounts (Scopa) to investigate it were thwarted by the ANC. Schabir Shaik was convicted of bribing Jacob Zuma on behalf of some of the suppliers, but, as also noted above,

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Mr Zuma has hitherto escaped prosecution. A joint report in 2002 into the deal by the auditor general, the national director of public prosecutions, and the public protector was dismissed as a whitewash after parts of it had been rewritten under pressure from the Cabinet and President Thabo Mbeki. A probe into the deal by the Scorpions was shut down by the Hawks following the dissolution of the Scorpions. Suspected wrongdoing includes generous payments not only to Mr Zuma, but also to the ANC and others, although the only major prosecution has been that of Mr Shaik. Several investigators and lawyers working with Judge Seriti’s commission, among them another judge, were removed or resigned, some of them accusing him of pursuing a “second agenda” to ensure that senior members of the ANC were not implicated. Corruption Watch and the Right2Know Campaign launched an application to have the Seriti report set aside.

### CONCLUSION

*What is striking about all the above examples is how widely they range across the country and across the various functions of the state.*

What is striking about all the above examples is how widely they range across the country and across the various functions of the state. Many of these illegalities receive considerable media attention, which may sometimes result in their reversal. The charges laid against the finance minister may have adverse consequences for the economy as a whole. However, when ordinary people suffer, the consequences may hurt nobody but themselves. Even so, they may be devastating to a hawker whose stock is confiscated or the family of a person unlawfully shot dead by the police. The machinations around the charges facing Mr Zuma, the campaign against Mr Gordhan, and the massive publicity around the problem of “state capture” have helped to alert business leaders to the possible economic costs of lawlessness on the part of the state. Pennies are also dropping in ANC circles as the possible electoral consequences of Mr Zuma’s behaviour are anticipated. Critically important is that South Africa has a range of non-governmental organi-

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sations – and newspapers – willing to stand up for the rights of refugees, or prisoners denied treatment, or of people tortured by the police.

*An end to the rule of Jacob Zuma might help to curtail large-scale lawlessness on the part of the Presidency, the Cabinet, and the NPA. But the challenge of restoring a culture and practice of legality right across all the organs of state and agencies of government will be very much greater.*

An end to the rule of Jacob Zuma might help to curtail large-scale lawlessness on the part of the Presidency, the Cabinet, and the NPA. But the challenge of restoring a culture and practice of legality right across all the organs of state and agencies of government will be very much greater. And it must take account of the interests of all the ordinary people whose plight has been highlighted in this paper. All over again, it seems, we need to inculcate among those who rule us the idea that they are entitled to do only what the law empowers them to do, and that they must to do it according to the rules that comprise the law.

– John Kane-Berman

\* Kane-Berman is a policy fellow at the IRR